Supreme Court, U.S.
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# Supreme Court of the United States

**October Term, 1994**

L. BATES,

*Petitioner,*

*against*

ROBERT WALKER,

*Respondent.*

JOHN MAHONEY,

*Petitioner,*

*against*

MICHAEL MAYS,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## Question Presented

Whether § 1983 provides a prisoner a damages remedy for more restrictive confinement during the pendency of appeal which promptly reversed a procedurally defective disciplinary hearing.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Bates and Mahoney respectfully pray that a writ of certiorari issue to review the opinions of the United

States Court of Appeals for the Second Circuit entered in these actions on April 29, 1994. The opinions reversed judgments of the United States District Courts for the Western and Southern Districts of New York, respectively.

## Opinions Below

The opinions of the Court of Appeals, rendered on April 29, 1994, are set forth in Appendix A. *Walker v Bates* is reported at 23 F3d 652. *Mays v Mahoney* is reported at 23 F3d 660.

The judgment, decision of the District Court and report/recommendation of the Magistrate in *Walker v Bates* are set forth in Appendix B.

The judgment, decision of the District Court, and report/recommendation of the Magistrate in *Mays v Mahoney* are set forth in Appendix C.

## Jurisdiction

The decisions of the Court of Appeals were filed on April 29, 1994. This petition for certiorari is filed within 90 days of that date. The Court's jurisdiction to review the case rests upon 28 USC § 1257(a).

## Constitutional and Statutory Provisions Involved

The United States Constitution, Fourteenth Amendment, Section 1, provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## Statement of the Case

### 1. *Bates v Walker*

The facts as alleged in Walker's amended complaint (WA90-93)[1] are as follows. Walker was a prisoner in prisons operated by the New York State Department of

[1]Numbers in parentheses marked WA refer to pages in the Appendix in the *Walker* appeal in the Second Circuit.

Correctional Services. On December 5, 1990, while incarcerated in the Southport Correctional Facility, he received a misbehavior report charging him with violation of the institutional rules prohibiting possession of a weapon and excess state clothing (WA91). The report, written by Corrections Officer Yowmans, stated that the author had discovered a weapon (a metal rod 9½ inches long) in the wall locker above Walker's desk, as well as extra laundry, while performing a routine cell search of Walker's cell at 9:25 a.m. on that day (WA57). A Tier III disciplinary hearing (7 NYCRR Pt 254, *see*, *People ex rel. Vega v Smith*, 66 NY2d 130, 138 [1985]) was held for Walker on December 10, presided over by petitioner Bates. Bates refused Walker's request to call Officer Yowmans, Sergeant Quarnek and Officer Gibson, as witnesses. Walker was found guilty of the weapons charge and sentenced to 120 days confinement in the Special Housing Unit (WA91).[2] Walker filed an administrative appeal (WA91-92) (*see*, 7 NYCRR 254.8). The determination was administratively reversed on February 8, 1991. That reversal was memorialized in a notice dated February 11, 1991, which also provided that rehearing should be commenced within 7 days of receipt of the notice (WA56). The facility chose not to conduct a rehearing; the records were expunged of all references to the misbehavior report. Walker was released from SHU after having served 77 days (WA92).

Walker instituted the underlying action in the United States District Court for the Western District of New York pursuant to 42 USC § 1983. The basis for federal jurisdiction in that court was 28 USC § 1343. Petitioner Bates moved to dismiss under Fed R Civ Proc 12(b)(6) on the ground that the administrative reversal provides all the proc-

[2]Special Housing Units are isolated cell blocks separate from those housing the general population. 7 NYCRR 300.2(b).

ess to which plaintiff was due. Magistrate Judge Fisher recommended that the motion be denied in a Report-Recommendation dated October 9, 1992 (WA18-25). The district court rejected the Report-Recommendation and granted the motion in a decision dated January 5, 1993 (WA5-6). Invoking its recent decision in *Sowell v Ryan*, 823 F Supp 107 (WDNY 1992), *affd without opn*, 996 F2d 302 (2d Cir 1993), which was predicated upon *Young v Hoffman*, 970 F2d 1154 (2d Cir 1992), the court reasoned that

> The inmate was able to vindicate his hearing rights by means of the administrative appeal afforded to him. Whether the prisoner was confined during the appeal process is wholly irrelevant to this analysis (823 F Supp at 110).

On appeal, the Second Circuit reversed in a decision dated April 29, 1994. Relying on *Cleavinger v Saxner*, 474 US 193 (1985), and *Patterson v Coughlin*, 761 F2d 886 (2d Cir 1985), *cert denied*, 474 US 1100 (1986), the court held that administrative reversal of the hearing did not preclude § 1983 liability for the confinement between the hearing and the reversal. Judge Mahoney dissented, noting that the issue presented in this case was not before the Supreme Court in *Cleavinger* and that *Cleavinger* was not controlling. He reasoned that, in light of the great number of hearings, administrative appeals and reversals, "(i)t seems to me neither workable nor constitutionally required, in this context, to posit a § 1983 violation whenever there is *any* disciplinary detention however limited, after a constitutionally infirm hearing that is subsequently rectified by an internal administrative appeal" (slip op p 3751).

*2. Mahoney v Mays*

Mays was also a prisoner in prisons operated by the New York State Department of Correctional Services. In a misbehavior report dated July 22, 1990, he was charged with refusing a direct order, making threats, and assaulting a staff member at the Sing Sing Correctional Facility (MA33-34).[3] The report, written by Corrections Officer Dorcean, stated that when he approached Mays and ordered him to leave the gallery and to lock in his cell, Mays refused the order twice, told the officer he was not leaving, and said that the officer should leave instead. When the officer repeated his order, Mays replied by uttering profanities. He then placed his hand on the officer's stomach and pushed him. The officer responded by withdrawing his baton and stepping back. Mays then approached him in a violent manner. Despite the officer's order that he stop, Mays continued his violent approach, saying "I'm sick of you motherfuckers; what the fuck you want to do." About eight other inmates were standing around the unsecured gallery at this time. The dispute ended without further escalation only because another inmate intervened, grabbed Mays, and directed him to lock in as ordered. As a result of the incident, Mays was placed in keeplock[4] pursuant to 7 NYCRR 251-1.6 pending a disciplinary hearing.

The parties disagree about what happened next. There is no dispute, however, that the documents made available to the hearing officer, petitioner Mahoney, show that Mays

[3]Numbers in parentheses marked MA refer to the Appendix in the *Mays* appeal in the Second Circuit.

[4]An inmate placed in keeplock is confined to his own cell. *McKinnon v Patterson*, 568 F2d 930, 936 (2d Cir 1977), *cert denied*, 434 US 1087 (1978).

was served with the misbehavior report on July 22, the day after the incident (MA35, 38). The documentation further reflects that on July 22, Mays told Correction Officer Zsido that he waived his right to an assistant to help him defend against the charges and did not request any witnesses (MA35, 38), and that on July 26, he told Correction Officer Ortiz that he waived his right to attend his disciplinary hearing (MA36, 38). However, Mays refused to sign the forms that the witnessing officers prepared to confirm these waivers of his rights (MA35, 37), and he now denies that he saw the misbehavior report or was told of the hearing before it took place (MA8).

The hearing transcript (MA36-41) indicates that at the July 26 hearing, Hearing Officer Mahoney noted that, according to the documents he had before him, Mays had been served with the misbehavior report, notified of his right to an assistant and witnesses, and invited to participate in the hearing, but that he had declined assistance, requested no witnesses, and refused to attend the hearing (MA36, 38). Hearing Officer Mahoney then read the misbehavior report into the record (MA38-39).

Based on the undisputed evidence before him, Hearing Officer Mahoney found Mays guilty of all three charges (MA39-41). He then imposed a penalty of 45 days keeplock from the date of the offense, loss of package, commissary and telephone privileges for the same period, and two months' loss of "good time" (MA39-40).

Mays admits (at MA10) that he was served with a copy of the hearing disposition form (MA41). However, he refused to sign the form acknowledging that he had received it (MA41).

On July 28, Mays appealed his disciplinary disposition to the Commissioner of the Department, Thomas Coughlin (MA10-13). Sing Sing Superintendent John P. Keane then conducted a discretionary Superintendent's review of the charges pursuant to 7 NYCRR 254.9. On September 12, he reversed the disposition for "procedural error" (MA42). As the brief 45-day sentence was complete a few days before the hearing was reversed, the Superintendent's review did not prevent Mays from serving his time in keeplock with loss of package, telephone and commissary privileges. Nevertheless, the reversal resulted in a restoration of Mays' "good time" credits and the expungement of the administrative conviction from his record (MA43-45).

Plaintiff instituted the underlying action in the United States District Court for the Southern District of New York pursuant to 42 USC § 1983. The basis for federal jurisdiction in that court was 28 USC § 1343. Both parties moved for summary judgment (MA46-48, 52-53). In his cross motion, petitioner Mahoney asserted that Mays was given due process because any errors in his disciplinary hearing were cured by the reversal on his administrative appeal. Mahoney also urged that liability was precluded by qualified immunity.

On August 16, 1993, Magistrate Judge James C. Francis IV issued a report and recommendation recommending that both parties' motions be denied (MA49-62). Following the filing of Mahoney's objections, the district court declined to accept the recommendation and instead granted Mahoney summary judgment in a decision dated October 22, 1993,

predicated upon *Young v Hoffman, supra,* and *Russell v Scully,* 15 F3d 219 (2d Cir 1993) (*Russell I*) (MA69).[5]

On appeal, the Second Circuit reversed in a decision dated April 29, 1994, which, in pertinent part, simply followed *Walker.*

## REASONS FOR GRANTING THE WRIT

**Certiorari is warranted because the underlying issue of the availability of § 1983 as a damages remedy for unsanctioned procedural mistakes by hearing officers in the state's prison systems for dispensing justice which are promptly remedied on administrative appeal is an issue of significance, the holding below conflicts with *Zinermon v Burch,* and the circuits are in conflict as to the meaning of *Zinermon.***

This case raises the issue of the proper scope of the rule of *Parratt v Taylor,* 451 US 257 (1981), as applied in *Zinermon v Burch,* 494 US 113 (1990). The First, Fifth (en banc), Seventh (en banc), Eighth and Eleventh (en banc) Circuits construe *Zinermon* as teaching that § 1983 "should not be employed to remedy deprivations which occur at the hands of a state employee who is acting in direct contravention of the state's established policies and procedures which have been designed to guarantee the very protections which the *employee* now has chosen to ignore." *Easter House v Felder,* 910 F2d 1387, 1404 (7th Cir 1990) (en banc), *cert denied,* 498 US 1067 (1991). The Fourth and Tenth Circuits,

[5]Following a petition for rehearing, *Russell I* was withdrawn in pertinent part and a new holding based solely upon qualified immunity substituted in its place. 15 F3d at 222 (2d Cir 1994) (*Russell II*).

and the Second Circuit below[6] adhere to the view that § 1983 liability does lie where the state officials responsible for the deprivation have the power and duty under state law to provide a hearing prior to the deprivation and fail to provide the requisite hearing. Applying this interpretation, the Second Circuit found § 1983 liability in the instant cases notwithstanding that the state hearing procedures adequately implemented *Wolff v McDonnell*, 418 US 539 (1974), and the hearing errors in question by the defendant hearing officers were unauthorized departures from those procedures, and were promptly remedied by reversal on administrative appeal. The position of the Second Circuit is that any error made by a hearing officer in implementing the *Wolff v McDonnell* procedures, such as not calling a required witness in a case where punitive confinement starts before the hearing error is cured by reversal on administrative appeal, presents an actionable § 1983 case.[7]

The decisions below are incorrect under the teaching of this Court, principally *Zinermon*, and in conflict or at least inconsistent with the decisions of the First, Fifth, Seventh, Eighth, and Eleventh Circuits construing that law. Certiorari should be granted so that the question may be authoritatively resolved. Moreover, the issue is important because the underlying question of the availability of § 1983 as a damages remedy for unsanctioned procedural mistakes by hearing officers in the States' procedural systems, including particularly those for dispensing mass jus-

[6]*But see, Katz v Klehammer*, 902 F2d 204, 207 n 1 (2d Cir 1990). *Simmons v Chemung Co. Dept of Soc. Serv.*, 770 F Supp 795, 798-801 (WDNY 1991), *affd without opn*, 948 F2d 1276 (2d Cir 1991).

[7]Where the cure occurs before the beginning of the punitive confinement, the Second Circuit agrees that § 1983 does not lie. *Young v Hoffman*, 970 F2d 1154 (2d Cir 1992).

tice in the prisons, which are promptly remedied on administrative appeal, is one of national significance. Further, the explosion in the prison population, and the concomitant increase in disciplinary proceedings and the resulting substantial expenditure of judicial and state resources on these cases, are additional factors warranting certiorari here. The issue is also important because New York has invested substantial time and effort to establish a fair and effective prison disciplinary system with various levels of review and other built-in safeguards intended to maximize accuracy in dispositions. The availability of an administrative appeal is thus an important component of the process New York State affords to inmates accused of misconduct. The decision below will serve as a disincentive to further refinements in the disciplinary hearing process.

1. The holding below is incorrect under applicable Supreme Court law. In *Parratt v Taylor*, 451 US 527 (1981) (negligent loss of hobby kit by prison officials), and *Hudson v Palmer*, 468 US 517 (1984) (intentional deprivation of property by guard), this Court held that a deprivation of property caused by a state employee's random, unauthorized conduct does not give rise to a § 1983 procedural due process claim, unless the State fails to provide an adequate post-deprivation remedy. "The underlying rationale . . . is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur." 468 US at 533. Here, of course, New York has established a carefully delineated, clear cut procedural scheme, one which the Second Circuit recognized as comporting with *Wolff*. *Walker*, slip op pp 3739-41. The question therefore is whether any error in application of that

procedure is a denial of due process or whether only a deficiency in the procedure itself should be deemed such a denial.

The closest case in point is *Zinermon v Burch*, which the Second Circuit totally ignored. *Zinermon* involved the voluntary admission of a person to a Florida mental institution. He later sued on the ground that the hospital officials had deprived him of liberty without due process because they knew or should have known that he had been incompetent to give informed consent to his admission. 494 US at 121. The Court held that while *Parratt* and *Hudson* also apply to deprivations of liberty (494 US at 131-132), unlike those cases where the very nature of the deprivation made a requirement of predeprivation process absurd, there was nothing absurd in requiring better pre-deprivation safeguards to screen for incompetence, since it could have been anticipated that persons seeking voluntary admission might well not be competent to consent to such admission. The Court reasoned: "had the State limited and guided petitioners' power to admit patients, the deprivation might have been averted." 494 US at 113. *Zinermon* teaches, however, that "where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, post deprivation remedies might satisfy due process." 494 US at 132. Thus, *Zinermon* seems to stand for the proposition that not every hearing officer error in a predeprivation hearing will result in a denial of due process. Rather, if the state procedural scheme is "as detailed a predeprivation safeguard as could have been provided" and the post deprivation remedies are adequate, such blunders will not per se establish a violation of due process. *Lowe v Scott*, 959 F2d 323, 344 (1st Cir 1992); *Caine v Hardy*, 943 F2d 1406, 1414 (5th Cir 1991) (en banc), *cert denied*, ____ US ____, 112 S Ct

1474, 117 L ed 2d 618 (1992); *Easter House v Felder*, 910 F2d at 1404; *Zar v S.D. Bd. of Examiners*, 976 F2d 459, 465 (8th Cir 1992); *McKinney v Pate*, 20 F3d 1550, 1561-1564 (11th Cir 1994) (en banc); *but see*, *Winters v Board of County Commissioners*, 4 F3d 848 (10th Cir 1993); *Plumer v State of Maryland*, 915 F2d 927 (4th Cir 1990).

The foregoing split in the circuits stems from the fact that *Zinermon* distinguished *Parratt* and *Hudson* for three reasons: (1) the deprivation was not unpredictable; (2) more predeprivation process was not impossible; (3) the conduct at issue could not be characterized as unauthorized within the meaning of *Parratt* and *Hudson* because the "State delegated to them the power and authority to effect the very deprivation complained of here." 494 US at 136-138. The courts agreeing with us believe this third reason cannot be read in isolation; otherwise, the first two reasons are read out of the case and the Court's exhaustive discussion as to the possibility of developing better, more protective procedures is rendered irrelevant. In addition to stating the two additional reasons and discussing the clear possibility of improved State regulations, the Court also emphasized that Burch's claim should be understood as one "seek(ing) to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue." 494 US at 136. That permits the ready inference that primacy was intended to go to the adequacy of the State's procedures and that the critical inquiry is whether any more circumscribed state procedures would have prevented the deprivation at issue.

The court below erroneously focused solely on the third reason in relying upon its pre-*Zinermon* decision in *Patterson v Coughlin*, 761 F2d 886 (2d Cir 1985), *cert denied*, 474

US 1100 (1986).[8] While recognizing the adequacy of the State's procedural scheme in implementing *Wolff*, the court below did not otherwise give any significance to that factor. Significantly, the court did not even mention *Zinermon*.

Moreover, *Cleavinger v Saxner*, 474 US 193 (1985), upon which the court below also placed heavy reliance, is not germane here. *Cleavinger* does not speak to the *Zinermon* issue at all. It held only that federal hearing officers in prison cases are not entitled to absolute immunity. The analysis in absolute immunity cases is totally different, starting from the fact that judges were also immune at common law as a matter of public policy and that § 1983 did not change that. As the dissenter below points out, the question whether plaintiff had stated a due process claim was never before this Court in *Cleavinger* and the analysis would have been completely different. *Walker*, slip op, pp 3749-3750. Since the present issue was not raised in *Cleavinger*, that decision is not relevant to this case.

Under *Zinermon*, the essential focus becomes, as the circuits which agree with us urge, upon the quality of the State's procedures and whether as a practical matter, any more protections would avert the pertinent deprivation. Here, there is no question that the State's procedural scheme conforms to *Wolff*.[9] Hearing officers have no discretion to

[8]Patterson was cited in *Zinermon* as exemplifying the conflict between the circuits which *Zinermon* was intended to resolve. 494 US at 116 & n 2.

[9]The disciplinary process is a creature of the regulations. 7 NYCRR Pts 250, *et seq*. *See*, *People ex rel. Vega v Smith*, 66 NY2d 130, 138-139 (1985). Further, New York provides several procedural protections at the hearing in addition to those required by *Wolff*, *e.g.*,
(Footnote continued on next page.)

depart from the regulations (*Matter of Bryant v Coughlin*, 77 NY2d 642, 647, 649-650 (1991); *Matter of Garcia v LeFevre*, 64 NY2d 1001, 1003 (1985). If a hearing officer complies with them, the inmate will receive a hearing comporting with *Wolff*. However, given the flood of hearings,[10] individual mistakes are inevitable. *See*, *Bishop v Wood*, 426 US 341, 350 (1976). "It ignores reality to expect that the Government will be able to 'secure perfect performance from its . . . employees'". *Office of Personnel Management v Richmond*, 496 US 414, 433 (1990).

Thus, as in *Parratt* and *Hudson*, and unlike *Zinermon*, this is a case in which additional predeprivation process is

(Footnote continued.)
the provisions for electronic recording (7 NYCRR 254.6[b]), for a hearing within seven days (251-5.1), for a written reason if witnesses are denied (254.5[a]), and to be present for the testimony of witnesses (254.5[b]).

[10]In 1993, there were almost 24,751 Tier III hearings, with 6,295 administrative reviews and 808 reversals and 814 modifications. Department of Correctional Services (DOCS), 1993 Summary of Inmate Disciplinary Activity. This represented a substantial increase from 1990, when the *Walker* and *Mays* hearings were held, and there were 22,191 Tier III hearings, 5,932 reviews, 563 reversals and 441 modifications. DOCS, 1990 Summary of Inmate Disciplinary Activity. This represented a sharp increase from 1988 when there were 13,806 Tier III hearings, 4,267 reviews, 409 reversals and 274 modifications. DOCS, 1988 Summary of Inmate Disciplinary Activity. Significantly, Tier III hearings have historically represented only about one fourth of the total of Tier II (7 NYCRR Pt 253 [penalty of 30 days or less]) and Tier III hearings. In 1993, there were 76,476 Tier IIs in addition to the Tier IIIs. DOCS, Disciplinary Reports Reviewed by Tier Report for Jan. 1993 through Dec. 1993. The very high number of hearings is a characteristic of State prison systems throughout the United States. *See*, Jones & Rhine, Due Process and Prison Disciplinary Practices: From *Wolff* to *Hewitt*, 11 New England Journal on Criminal & Civ. Confinement, 105-106 (1985).

"simply 'impracticable'" for the State to provide. 468 US at 533 "(I)t would be absurd to suggest that the State hold a hearing to determine whether a [hearing officer] should engage in such conduct". *Zinermon*, 494 US at 137. The possibility of "marginally beneficial measures" such as "(m)ore sensible staffing practices [and] better training does not alter the analysis." *Zinermon*, 494 US at 145 (O'Connor, J., dissenting).

The theoretical possibility of a stay of the penalty does not undermine this conclusion. The State's security interest in confining the inmate is essentially the same from the hearing to the appeal as during the pendency of the hearing. *Hewitt v Helms*, 459 US 460, 473 (1983), established that the governmental interests at stake in more secure housing pending a disciplinary hearing—principally the security interest to protect the guards and other inmates—"are of great importance"; *see*, *Lowrance v Achtyl*, 20 F3d 529, 537 (2d Cir 1994). In fact, the State's security interest pending an appeal after a disciplinary conviction may be greater because the inmate's misbehavior has been confirmed as a matter of evidence by the hearing officer, albeit after a procedurally defective hearing. Under such circumstances, a failure to confine the inmate might well constitute deliberate indifference to the safety of other inmates such as to warrant Eighth Amendment liability. *Farmer v Brennan*, ___ US ___, 62 USLW 4446, 4450-4451 (June 6, 1994).

Most States (*see*, *Babcock*, *infra*, p 19), including New York, have rejected the stay option. New York has reasonably concluded that the additional administrative burdens occasioned by a stay of the penalty pending appeal would "detract from the ability to perform the principal mission of the institution." *Ponte v Real*, 471 US 491, 498 (1985).

Those burdens include the coordination of efforts by disparate and far-flung personnel[11] to continue administrative confinement pending the appeal in order to ensure the maintenance of security.

2. Accordingly, since greater predeprivation process is "impracticable", the inquiry turns to the adequacy of the post-deprivation remedies. *Zinermon*, 494 US at 132. All that is required is a "meaningful post-deprivation remedy". *Hudson*, 468 US at 531. The adequacy of the remedy is not determined in a vacuum, but in the context of the relevant interests. *Zinermon*, 494 US at 132, *citing*, *Ingraham v Wright*, 430 US 651, 682 (1977). The administrative reversal here was adequate. New York has reasonably concluded that administrative review is the most practical remedy for hearing officer error both for the State and for the inmate. The remedy is quick and economical. The State gains an opportunity to correct its errors. The inmate gains a further opportunity to vindicate himself. Recognizing these considerations, New York's Court of Appeals recently gave an expansive reading of the Department's powers with respect to administrative appeals. *Dawes v Coughlin*, 83 NY2d 597 (1994).

While absolute immunity precludes a damages action in State courts for the confinement pending the reversal (*Arteaga v State*, 72 NY2d 212 [1988]), that does not render the State's remedial scheme inadequate. Note, From *Parratt* to *Zinermon*: Authorization, Adequacy and Immunity In a Systemic Analysis of State Procedure, 11 Cardozo L Rev 831,

[11]While the administrative review for Tier III hearings is performed by the Commissioner's designee at the department's headquarters in Albany, the State Capitol, the prisons are scattered throughout the State. 7 NYCRR Pt 100.

865-872 (1990). State remedies may be adequate without providing all the relief available under § 1983. *Parratt*, 451 US at 544. A damages remedy is not required in all circumstances. *Clifton v Schafer*, 969 F2d 278, 282 (7th Cir 1992); *McClary v O'Hare*, 786 F2d 83, 87-88 (2d Cir 1986); *Hayes v Vessey*, 777 F2d 1149, 1152 (6th Cir 1985). Here, New York has articulated a compelling rationale for the immunity defense which precludes a damages recovery in state court. *Cf. Martinez v California*, 444 US 277, 280-283 (1980). The gravamen of that rationale, stated in *Arteaga v State*, is that

> Because of the unquestioned risks to inmates, employees, and the public from a breakdown in order and discipline in correctional facilities and the potentially tragic consequences of such occurrences . . . it is particularly important that correction officers not be dissuaded by the possibility of litigation from making the difficult decisions which their duties demand. Nor should correctional personnel acting as reviewing officers feel reluctant to reverse hearing determinations because doing so might expose the State to liability . . . (72 NY2d at 220)

The adequacy of New York's remedial scheme is supported by the "public interest in evolutionary development of criminal justice by the governments that are most familiar with day-to-day law enforcement." O'Connor, "Keynote Address—Conference on Compelling Governmental Interests," 55 Albany L. Rev 535, 546 (1992); *see*, *Greenholtz v Nebraska Penal Inmates*, 442 US 1, 13 (1979) ("Our system of federalism encourages . . . State experimentation."). *Dawes v Coughlin*, 83 NY2d at 601 ("(T)his is a new area of the law in which some experimentation must be expected

and tolerated.") Given the "explosion" in the inmate population in recent years (New York Assembly's Committee on Ways & Means, Perspectives, The New York State Crisis in Corrections, p 1 [Occas. Paper No. 2, March, 1994]) and the vast increase in the number of disciplinary proceedings (*supra*, n 10), state prison officials must be accorded latitude "to adopt innovative solutions". *Turner v Safley*, 482 US 78, 89 (1987); *Bell v Wolfish*, 441 US 520, 547-548 (1979). The availability of administrative appeal "is one area in which prisoners due process rights have advanced since *Wolff*." Babcock, Due Process in Prison Disciplinary Systems, 22 BCL Rev 1009, 1083-1085 (1981) (41 prison systems in his survey, which did not include New York, had some form of administrative review; only 14 systems provided for suspension of the penalty in the event of appeal; the remainder caused the penalty to begin upon the completion of the hearing). With respect to the preclusion of a damages remedy by immunities, it has been observed that "[s]ince one advantage of *Parratt* is that it allows states to develop their own procedural norms, it would be a grave error to find that immunities—an integral part of the governmental system—render a system inadequate simply because they sometimes preclude compensation where the federal courts would grant it . . . . After all, it is the state's politically responsive institutions that can determine for a particular type of official whether discretion is more important than compensation; it is the states that must balance the need for immunity against the protection of its citizenry". Note, 11 Cardozo L Rev pp 871-872.

As for the private interest at stake, its relatively minor weight supports our view that the administrative remedy is sufficient and the absence of a damages remedy is not critical. Reversals, as these cases exemplify, are almost

always for procedural rather than evidentiary deficiency. In any case in which the reversal is for procedural error, the damages will be nominal only because the confinement was justified in fact. *Memphis Community School Dist. v Stachura*, 477 US 299, 307-308 (1986); *Carey v Piphus*, 435 US 247, 260-263 (1978); *see*, *Heck v Humphrey*, ____ US ____, 62 LW 4594, 4595-96 (June 21, 1994) (*Wolff* does *not* authorize damages recovery measured by the "actual loss of good time" but only for "using the wrong procedures").

Moreover, the confinement itself does not weigh heavily. *Hewitt v Helms* provides close precedent as it assessed restrictive confinement *pending* disciplinary hearings. As in *Hewitt*, the private interest at stake arising from the confinement pending the reversals is "not one of great consequence". 459 US at 473. In *Hewitt*, the inmate "was merely transferred from one extremely restricted environment to an even more confined situation." *Ibid.* Here the inmates were simply kept in the more restrictive confinement to which they had been transferred prior to the hearing. Moreover, there was neither loss of good time nor any effect on parole. The administrative reversal obviated either effect. Under New York law, hearing dispositions involving the loss of good time are only "tentative until such time as it actually affects consideration for parole or for conditional or other release, and shall then either be confirmed or be modified by the Commissioner or his designee." 7 NYCRR 260.4; *People ex rel. Jelich v Smith*, 105 AD2d 1125, 1126 (4th Dept 1984) ("This regulation merely recognizes that, since the Time Allowance Committee only meets once every three years with respect to a particular inmate * * * or four months before he becomes eligible for conditional release, the loss of good time cannot be actually implemented until then."); *see*, *Matter of Amato v Ward*, 41 NY2d 469 (1977).

Furthermore, the stigma attaching from the determination of wrongdoing referred to in *Hewitt* (459 US at 473) is similarly removed by the expungement of such a determination from the prisoner's record.

It is not a material distinction from the *Hewitt* reasoning that the confinement at issue here occurred *between* the hearing and the appeal. Indeed, in New York the administrative appeal was in fact part and parcel of the due process protections afforded inmates under New York law (*Young v Hoffman*, 970 F2d 1154, 1156 [2d Cir 1992], *see*, *Harper v Lee*, 938 F2d 104, 105 [8th Cir 1991]) so that the confinement in issue is fairly characterized as confinement pending the completion of the disciplinary proceedings. 7 NYCRR Pt 254 provides for the hearing (254.1-254.7) and the appeal (254.8), as well as discretionary reversal by superintendents (254.9). Disciplinary determinations pursuant to Part 254 are not final for judicial review under NY CPLR art 78 until the administrative appeal is complete. *Matter of Shahid v Coughlin*, 83 AD2d 8, 10-11 (3d Dept 1981), *affd for reasons stated below* 56 NY2d 987 (1982); *see*, 8 Weinstein-Korn-Miller, NY Civ Prac ¶ 7801.05 (1994).

It is also not a material distinction from *Hewitt* that State law labels the confinement between the hearing and the appeal determination "disciplinary". "(D)ifferences in nomenclature . . . should not be dispositive". *McKinnon v Patterson*, 568 F2d 930, 937 (2d Cir 1977), *cert denied*, 434 US 1087 (1978). The issue of the process due is not a function of "mere labels of state law" (*New York Times Co. v Sullivan*, 376 US 254, 269 [1964]), but depends upon a realistic assessment of the weight of the pertinent interests. *Mathews v Eldridge*, 424 US 319, 340-343 (1976). This Court reflected this rule in assuming in *Hewitt* that the

conditions of confinement there were "substantially identical" to "disciplinary segregation". 459 US at 463, n 1.[12]

The evaluation of the inmate's interest is not materially changed by the delay associated with the administrative reversal. *See generally, Cleveland Board of Education v Loudermill*, 470 US 532 at 557-58 (1985) (Brennan, J., concurring and dissenting). The delay in *Hewitt* between the commencement of prehearing confinement and the disciplinary hearing (at which the initial set of charges which were the basis for the confinement were dismissed), was 49 days. 459 US at 464-465. Here, the total time, including prehearing detention, was 45 days (Mays) and 77 days (Walker). For the generality of Tier III cases, review will be completed within the 60-day limit set by 7 NYCRR 254.8. For Tier II cases, the time frame is 15 days. 7 NYCRR 253.8.

Significantly, inmates "have a far less compelling claim to procedural safeguards" than do pretrial detainees who have been removed "from unrestricted liberty in open society and (placed) in an institution." *Hewitt*, 459 US at 475. The presumption of innocence attaches to such persons and they have a "right to be free from punishment". *Bell v Wolfish*, 441 US 520, 534 (1979). Nevertheless, the speedy trial rules of *Barker v Wingo*, 407 US 514 (1972), allow pretrial detention in very restrictive conditions (*see, Bell v Wolfish*) for many months. *Doggett v United States*, ____ US ____, 112 S Ct 2686, 2690-2691 & 2691 n 1, 120 L ed 2d 520, 528 & n 1 (1992) (delay up to a year considered

[12]While disciplinary keeplock and SHU may involve the loss of privileges available to pre-hearing keeplock inmates, that does not change the analysis because the loss of privileges (in *Mays*: packages, telephone and commissary) for a short time is not a significant deprivation. *See, Wolff*, 418 US at 571-2, p 19.

"ordinary" delay). It would be anomalous indeed if much shorter delay here should nevertheless trigger § 1983 recovery.

Contrary to the view of the court below, *Wolff v McDonnell* does not require the conclusion that the remedy was inadequate and § 1983 liability must lie because a hearing officer erred in carrying out a state scheme for hearings fully implementing *Wolff*. *Wolff* did not consider the adequacy of administrative appeal as a remedy for the occasional hearing officer error. Moreover, *Wolff* did not purport to preclude future developments. The decision acknowledged that the procedural framework it had mandated was "not graven in stone" and was subject to further consideration. 418 US at 572. That accords with sound principles of jurisprudence. *See*, Friendly, "Some Kind of Hearing", 123 U Pa L Rev 1267, 1301-1304 (1975). Moreover, as Justice Frankfurter stated, concurring in *Anti-Fascist Comm. v McGrath*, 341 US 123, 162-163 (1951), "'[D]ue process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . Representing a profound attitude of fairness . . . 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess . . .". We believe the administrative reversals provided an adequate and fair remedy and, contrary to the court below, all the process due.

## CONCLUSION

**For the reasons stated, the petition for a writ of certiorari should be granted.**

Dated: Albany, New York
July 15, 1994

Respectfully submitted,

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**APPENDIX A—Opinions of the United States Court of Appeals for the Second Circuit Rendered on April 29, 1994, in Walker v. Bates and Mahoney v. Mays**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 731—August Term, 1993

(Argued: December 15, 1993 Decided: April [illegible], 1994)

Docket No. 93-2107

ROBERT WALKER,

*Plaintiff-Appellant,*

—v.—

L. BATES, Hearing Officer,

*Defendant-Appellee.*

Before:

FEINBERG, MINER and MAHONEY,

*Circuit Judges.*

Appeal from judgment entered in the United States District Court for the Western District of New York (Larimer, *J.*) dismissing complaint for failure to state a claim in civil rights action brought by prisoner who alleges that his procedural due process rights were violated in the course

of a disciplinary hearing that resulted in a decision to confine him to a Special Housing Unit, the district court having concluded that reversal of the decision on administrative appeal cured any procedural defects in the hearing.

Reversed.

Judge Mahoney dissents in a separate opinion.

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MINER, *Circuit Judge*:

I.

Plaintiff-appellant Robert Walker appeals from a judgment entered in the United States District Court for the Western District of New York (Larimer, *J.*) dismissing his complaint against defendant-appellee L. Bates, a Tier III Hearing Officer at the Southport Correctional Facility ("Facility") where Walker is an inmate. In the complaint, grounded in the provisions of 42 U.S.C. § 1983, Walker

alleged that his constitutional procedural due process rights were violated in the course of a disciplinary hearing that resulted in a decision to confine him to the Special Housing Unit ("SHU") at the Facility. The district court concluded that reversal of the disciplinary hearing decision on administrative appeal cured any procedural defects in the hearing and dismissed the complaint pursuant to the provisions of Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. We reverse.

II.

On December 5, 1990, during the course of his confinement at the Facility, a prison maintained by the New York State Department of Correctional Services, Walker was issued an "Inmate Misbehavior Report" by Corrections Officer P. Youmans. In the Misbehavior Report Walker was charged with violation of an institutional rule prohibiting the possession of contraband in the form of a weapon and violation of another institutional rule prohibiting the possession of state bedding in excess of authorized issue. According to Youmans, the weapon was a metal rod approximately 9-1/2 inches long, and the excess bedding consisted of an extra pillow, two extra pillow cases and two extra sheets. The items allegedly were discovered by Youmans "while doing a routine cell frisk" of Walker's cell. Walker denied the charges, contending that he had just moved into the cell and that the items found by Youmans belonged to the prior occupant.

A Tier III disciplinary hearing was convened by Hearing Officer Bates on December 10, 1990 to consider the violations alleged in the Misbehavior Report. In the New York Prison System, Tier III disciplinary hearings, also

known as Superintendent's hearings, are used for the review of the most serious violations of institutional rules. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 270.3 (1989). Walker entered a plea of not guilty at the hearing and requested that three witnesses be called: Corrections Officer Youmans, the officer who wrote the Misbehavior Report; Gallery Officer Quarnek, who was in charge of the gallery area when the items were found; and Sergeant Zarnecki, who was assigned duties related to inmate housing at the time of the incident. Bates summarily refused the requests, proceeded with the hearing, found Walker guilty of both violations and imposed a sentence of confinement for 120 days in the SHU. Walker began serving that sentence on December 10.

III.

Walker administratively appealed Bates' decision to Donald Selsky, Director of Special Housing/Inmate Discipline for the Department of Correctional Services. In a notice dated February 11, 1991, Selsky reversed the decision of Bates "as of February 8, 1991," expunged Walker's disciplinary record and authorized a rehearing "within 7 days of the notice." Although no rehearing was held within the prescribed seven-day period, Walker was not released from SHU until February 22, 1991.

On February 28, 1991, Walker filed his pro se complaint in an action to recover damages pursuant to 42 U.S.C. § 1983 for due process deprivation. In the complaint Walker named Bates, Superintendent Robert McClellan and Commissioner Thomas Coughlin as defendants. The complaint later was amended to reflect the dismissal of Coughlin and McClellan as parties. Walker alleges that he improperly was denied his right to call wit-

nesses at the hearing and that the testimony of the witnesses would have corroborated his defense and altered the outcome of the hearing. Damages are sought for the entire period of his detention in SHU. On September 21, 1992, Bates moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, arguing that the administrative appeal cured any procedural defect in the hearing.

In a Report and Recommendation dated October 9, 1992, Magistrate Judge Fisher recommended to the district court that the motion to dismiss be denied. The Magistrate Judge concluded that Bates' refusal to permit Walker to call witnesses and Walker's subsequent confinement in the SHU stated a claim under section 1983. The Magistrate Judge further concluded that the administrative reversal did not cure the defective hearing.

By Decision and Order dated January 5, 1992, the District Judge rejected the Report and Recommendation of Magistrate Judge Fisher. The District Judge concluded that, based on his ruling in *Sowell v. Ryan*, 823 F. Supp. 107 (W.D.N.Y. 1992), *aff'd without opinion*, 996 F.2d 302 (2d Cir. 1993), decided subsequent to the filing of the Magistrate Judge's Report and Recommendation, the administrative reversal cured any constitutional improprieties in the hearing and dismissed the complaint with prejudice. Walker timely appealed to this Court.

IV.

According to regulations promulgated by the New York Department of Correctional Services,

> [a] *special housing unit* (*SHU*), in maximum security facilities as well as in designated medium secu-

> rity facilities, shall consist of single-occupancy cells grouped so as to provide separation from the general population, and may be used to house inmates confined to such units pursuant to Part 301 of this Title as well as such other inmates as approved by the commissioner or his designee.

N.Y. Comp. Codes R. & Regs. tit. 7, § 300.2 (1991). The regulations require SHU inmates to "be housed in an area designed to maximize facility safety and security." *Id.* § 300.1(b). Confinement in the SHU is a form of solitary imprisonment. In addition to being separated from the general prison population, SHU inmates are limited in the prison issue items and personal belongings they may possess. *Id.* § 302.2. Also limited are shower and exercise privileges. *McCann v. Coughlin*, 698 F.2d 112, 117 n.5 (2d Cir. 1983).

Admissions to the SHU are governed by Part 301 of the Regulations of the Department of Correctional Services. Part 301 provides for disciplinary admissions in consequence of the "[d]isposition of superintendent's (Tier III) hearing for a designated period of time as specified by the hearing officer (7 NYCRR 254.7)." N.Y. Comp. Codes R. & Regs. tit 7, § 301.2(a) (1991) (Section 254.7 provides a range of penalties that may be imposed by a hearing officer). Part 301 also empowers the prison authorities to admit inmates to the SHU for purposes of detention, *id.* § 301.3, administrative segregation, *id.* § 301.4, protective custody, *id.* § 301.5, keeplock for reasons such as confinement to await disposition of a disciplinary hearing, *id.* § 301.6(a) and other purposes approved by the Deputy Commissioner for Facility Operations, *id.* § 301.7.

The disciplinary hearing procedure requires that the Misbehavior Report be served on the inmate at least 24

hours before the hearing, *id.* § 253.6(a), and that the inmate be provided with an assistant to help him prepare for the hearing, *id.* § 253.4. The inmate must be present at the hearing unless he refuses to attend or his exclusion is warranted for reasons related to institutional safety or correctional goals. *Id.* § 253.6(b). The hearing must be recorded electronically, *id.* and the inmate, if present, is entitled to make oral or written statements and to submit documentary evidence, *id.* § 253.6(c). The regulations provide that

> [t]he inmate may call witnesses on his behalf provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals. If permission to call a witness is denied, the hearing officer shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented.

*Id.* § 253.5(a). Where there are adequate reasons to exclude a witness from the hearing, the statement of the witnesses may be tape recorded and made available to the inmate at the hearing. *Id.* § 253.5(b). Before the hearing, the inmate may address his request for witnesses either to the person appointed to represent him or to the hearing officer; a request for witnesses may also be addressed to the hearing officer at the hearing. *Id.* §§ 253.5(c)(1), (2).

The procedures established by the New York regulations comport with the due process procedural rights in disciplinary proceedings to which prison inmates are entitled. *See Wolff v. McDonnell*, 418 U.S. 539 (1974). "When restrictive confinement within a prison is expressly imposed as a disciplinary sanction . . . there will ordi-

narily be no doubt that the confinement impaired a liberty interest protected by state law and that the due process procedures specified in *Wolff* are therefore required." *Sher v. Coughlin*, 739 F.2d 77, 81 (2d Cir. 1984) (footnote omitted); *see also McCann*, 698 F.2d at 121-22 ("[A]n inmate who is or may be sentenced to a term of confinement in a Special Housing Unit has a right to the procedural protections of the Due Process Clause," including the right to call witnesses in his defense.). The denial of an inmate's right to call witnesses under circumstances such as those revealed here, constitutes, without more, a compensable constitutional due process violation. *See Patterson v. Coughlin*, 761 F.2d 886, 893 (2d Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986). The only issue presented in this case is whether the administrative appeals procedure provided by the New York regulatory scheme cured the violation. Walker exercised his right to appeal to the Commissioner of Corrections, and the Commissioner's designee, the Director of Special Housing/Inmate Discipline, reversed the hearing disposition and ordered a new hearing. *See* N.Y. Comp. Codes R. & Regs. tit 7, § 254.8(d) (1993). That hearing never was held, and Walker was discharged on February 22, 1991 after having been confined in the SHU since December 10, 1990, the date the penalty was imposed.

V.

In a case factually on all fours with this one, the Supreme Court held that members of a federal prison discipline committee established to hear and determine cases in which inmates are charged with infractions of prison rules are entitled to qualified, rather than absolute, immunity for constitutional violations in the conduct of the

hearings. *See Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985). The inmates in *Cleavinger* were found guilty of encouraging other inmates to engage in work stoppages and of other charges. One inmate was not allowed to call witnesses at the disciplinary hearing, and one was not allowed to cross-examine his accusers. The committee imposed upon each inmate the punishment of segregated detention and forfeiture of "good time." By administrative appeals to the Warden and to the Regional Director of the Federal Bureau of Prisons, they succeeded in being released from detention and having all records of their alleged misbehavior expunged. Their actions against the discipline committee members to recover damages and for other relief was tried to a jury, which awarded damages on finding that the Fifth Amendment due process rights of the inmates had been violated. The Seventh Circuit Court of Appeals affirmed, rejecting the defendants' contention that they were entitled to absolute immunity as members of the discipline committee. *See Saxner v. Benson*, 727 F.2d 669 (7th Cir. 1984).

Rejecting the government's claim of absolute immunity in these circumstances, the Supreme Court in *Cleavinger* concluded that qualified immunity provided sufficient protection for those called upon to adjudicate in the prison setting. The Court stated:

> All the committee members need to do is to follow the clear and simple constitutional requirements of Wolff v. McDonnell, supra; they then should have no reason to fear substantial harassment and liability. Qualified immunity has been widely imposed on executive officials who possess greater responsibilities.

*Cleavinger*, 474 U.S. at 207.

Then Associate Justice Rehnquist in dissent argued for a finding of absolute immunity in cases in which the administrative appeals process permits vindication of prisoners' claims:

> If in fact the administrative system set up by the government offers administrative relief from these officials' mistakes and thereby permits the vindication of constitutional claims in this manner, I believe that the grant of absolute immunity meets the conditions set out in Butz v. Economou.[1]

*Id.* at 211 (Rehnquist, J., dissenting). The majority, of course, saw it differently, making a clear distinction between those who are entitled to absolute immunity in the administrative process and those who are not. Prison disciplinary committee members, according to the majority,

> are not professional hearing officers, as are administrative law judges. . . . They are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. . . . It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.

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[1] 438 U.S. 478, 513 (1978) (holding inter alia that the role of an administrative law judge within a federal administrative agency is so "functionally comparable" to that of a judge as to entitle him to absolute immunity.)

*Id.* at 203-04. Although the Court did not deal directly with the question of whether the successful administrative appeal constituted a bar to the recovery of section 1983 damages, it let the damages judgment stand without comment, apparently satisfied that qualified immunity provided the members of the discipline committee with sufficient protection from suit, regardless of the outcome of the administrative appeal.

VI.

In an opinion that was filed seven months before the *Cleavinger* decision was announced, we determined that New York prison officials who placed an inmate in isolated confinement for prison rule infractions without complying with New York law or with *Wolff*'s due process requirements were subject to a claim for damages for constitutional deprivations, despite the availability of administrative appeal and of later state court remedies. *See Patterson*, 761 F.2d at 893. Although the administrative appeal was unsuccessful, an Article 78 proceeding instituted in the New York Supreme Court resulted in an Order of Stipulation dismissing the inmate's claim with prejudice but ordering his release, the restoration of his good time and the expungement from his record of any reference to the disciplinary proceeding. *Id.* at 889. In that case, as in this, the state failed to follow its own rules, which conformed to the requirements of *Wolff*.

We held in *Patterson* that a hearing is required before punishment may be imposed and that "a post-deprivation hearing, by way of an Article 78 proceeding or an action for damages in the Court of Claims, is inadequate, by definition, to meet the requirements of due process." *Id.* at 893. Particularly illuminating for the purpose of resolv-

ing the case now before us is this statement: "Once a cause of action for a constitutional violation accrues, nothing that the state does subsequently can cut off the § 1983 action." *Id.* at 893. The constitutional violation, in that case and this, obviously occurred when the penalty was imposed in violation of state law and due process requirements. Administrative appeal, whether successful or not, cannot cut off the cause of action any more than can a proceeding brought in the state courts to vacate the penalty imposed and vindicate the prisoner's rights.

We revisited this issue in *Young v. Hoffman*, 970 F.2d 1154 (2d Cir. 1992) (per curiam), *cert. denied*, 114 S. Ct. 115 (1993), a case in which the District Judge had granted summary judgment and awarded nominal damages of $1.00 to a New York prison inmate who was deprived of his right to call witnesses at a disciplinary hearing. The District Judge also predicated the grant of summary judgment on the deprivation of the plaintiff's right to be present at the hearing and his right to have an impartial hearing officer in his Tier III disciplinary hearing. We reversed, because the Director of Special Housing/Inmate Discipline of the Department of Correctional Services reversed the hearing disposition *before* the inmate began to serve his SHU confinement sentence: "[T]he penalty and recommended loss of good time were vacated and the records of the hearing were expunged. Young never served a day of the penalty." *Id.* at 1155. Accordingly, we determined that Young "suffered no interference with a liberty interest and ha[d] no valid claim for relief." *Id.* at 1156. In the case presently before us, the appellant had served a substantial portion of his disciplinary sentence before he was released. Indeed, he was not released from his confinement until some time after his penalty was vacated and all charges against him were dismissed.

In our most recent pronouncement on the subject of the due process rights of prisoners in the disciplinary context, "[w]e d[id] not reach the question of whether due process is violated by the imposition of punishment pending an appeal that redresses any error in the earlier proceeding." *Russell v. Scully*, 15 F.3d 219 (2d Cir. 1994). In *Russell*, the inmate claimed that the Hearing Officer, Captain Wright, did not properly examine into the credibility of certain confidential informants at the time of the hearing in 1989. It appeared that the Hearing Officer did make some inquiry independent of the assessment made by a prison employee witness. We determined that "[i]t was not clearly established in 1989 (and is not now) that the procedure followed by Captain Wright constituted a constitutionally inadequate independent examination of credibility." *Id.* at 223. Accordingly, we concluded that Wright was protected by qualified immunity and entitled to summary judgment for that reason.

It was clear to us in *Russell* that the inmate

> would not have been released from the SHU pending the appeal even had Captain Wright not begun the designated punishment. Confinement in the SHU would thus have continued whether or not the punishment began, and Russell thus did not suffer a constitutional harm by the confinement during the appeal period.

*Id.* at 222. In the present case, it is clear that Walker was confined *only* for punishment purposes and there is no indication in the record here that he would have been confined in the SHU for any other reason had his punishment not begun. We earlier took note of the various regulations of the New York Prison System governing confinement in the SHU. Those regulations provide a number of reasons,

other than sentence to a disciplinary term, for which inmates may be admitted to the SHU. For example, the regulations provide for confinement to await disposition of a disciplinary action. *See* N.Y. Comp. Codes R. & Regs. tit.7, § 301.6(a) (1990). None of those reasons formed the basis for Walker's special confinement. He began to serve his disciplinary sentence immediately after his hearing, as ordered, and continued his confinement in the SHU on that sentence until he was released.

While it is true, as we observed in *Russell*, that many appellants in the federal criminal system are serving their sentences when their convictions are reversed and have no due process damages claims by virtue of constitutional error at their trials, it now seems to us that the difference is a function of the different types of immunity afforded to those who impose sentence. For a number of good reasons delineated in its opinions, the Supreme Court has decreed that those who perform purely judicial functions are entitled to absolute immunity, *see, e.g., Stump v. Sparkman*, 435 U.S. 349, 359 (1978) (state judge); *Butz v. Economou*, 438 U.S. 478, 513 (1978) (administrative law judge), while those who adjudicate disciplinary hearings in prisons are entitled to qualified immunity only, *see Cleavinger*, 474 U.S. at 206. It is this qualified immunity, rather than the proposed fiction that the administrative appeals process provided for prisoners is a continuation of the disciplinary hearing and provides all the due process necessary, to which prison officials must look for their protection. The dissent in *Cleavinger* would confer absolute immunity upon prison officials where an administrative appellate process is provided. That is not the rule.

The rule is that once prison officials deprive an inmate of his constitutional procedural rights at a disciplinary hearing and the prisoner commences to serve a punitive

sentence imposed at the conclusion of the hearing, the prison official responsible for the due process deprivation must respond in damages, absent the successful interposition of a qualified immunity defense. In the case before us, the Hearing Officer denied a request for witnesses without any finding that their testimony would be immaterial or redundant or that institutional safety or correctional goals would be jeopardized by their presence. There may have been some good reason for this summary denial of the inmate's request, but it is not apparent on the face of the record before us. The issue of qualified immunity can be addressed by the district court on remand. We hold only that Walker's success in the administrative appeal process does not bar his section 1983 claim and that his complaint states a claim for relief.

VII.

The judgment of the district court is reversed, and the case is remanded for further proceeding consistent with the foregoing.

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MAHONEY, *Circuit Judge*, dissenting:

I respectfully dissent.

The majority invokes *Cleavinger v. Saxner*, 474 U.S. 193 (1985), and *Patterson v. Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986), as calling for reversal in this case. I disagree with that assessment.

*Cleavinger* concededly dealt with a factual setting that is comparable to this appeal, in that a prisoner was awarded damages for unlawful confinement pursuant to a

disciplinary ruling that was reversed by an internal prison administrative appeal, and the defendants were the prison authorities who rendered the initial disciplinary ruling. The Court explicitly stated, however, that: "The sole question raised by petitioners in this Court is whether, as committee members, they were entitled to absolute immunity. Petitioners state that they have not challenged-although they do not concede—the ruling that they violated 'clearly established rights' of respondents." 474 U.S. at 199 n.5.

It is accordingly clear that the issue that must be decided on this appeal was never presented to, or considered by, the Court in *Cleavinger*. It is thus pure speculation to attribute to the *Cleavinger* Court, as the majority does, "apparent[ ] satisf[action] that qualified immunity provided the members of the discipline committee with sufficient protection from suit, regardless of the outcome of the administrative appeal." That speculation does not invest *Cleavinger* with any precedential significance for the resolution of an issue that *Cleavinger* never addressed.

Similarly, *Patterson* should not be deemed to control decision here. As the majority recognizes, the prisoner in *Patterson* was unsuccessful in his administrative appeal, but prevailed in an independent proceeding in state court. We held that "an Article 78 proceeding or an action for damages in the Court of Claims" would not cure an administrative denial of due process, commenting that: "Once a cause of action for a constitutional violation accrues, nothing that the state does subsequently can cut off the § 1983 claim." 761 F.2d at 893. Once again, *Patterson* simply does not address the question whether a "constitutional violation accrues" at all when there is an adverse disciplinary ruling that is reversed by the appel-

late operation of the prison's internal administrative process.

I agree with the majority that both *Russell v. Scully*, 15 F.3d 219 (2d Cir. 1994), and *Young v. Hoffman*, 970 F.2d 1154 (2d Cir. 1992) (per curiam), *cert. denied*, 114 S. Ct. 115 (1993), are distinguishable, because in *Russell* our holding was premised upon qualified immunity, *see* 15 F.3d at 223-24, and in *Young* the prisoner never commenced service of his disciplinary sentence. *See* 970 F.2d at 1155. I note, however, that the primary basis of the ruling in *Young* was the administrative correction of the violative disciplinary determination, while the fact that the prisoner never commenced his sentence was adverted to "[i]n addition" in a concluding paragraph. *See id.* at 1156. Nonetheless, we are presented with an issue as to which, in my view, there is no controlling Supreme Court or Second Circuit precedent.

I would resolve the issue by ruling that there is no procedural due process violation that gives rise to a § 1983 action when a prison disciplinary determination that violates constitutional standards is rectified by a timely internal administrative appeal. Bates' appeal brief points out that in 1992 alone there were 20,097 Tier III hearings in the New York prison system, and 5,588 reviews resulting in 4,291 affirmances, 620 modifications, 590 reversals, and 87 decisions in nondisciplinary categories. It seems to me neither workable nor constitutionally required, in this context, to posit a § 1983 violation whenever there is *any* disciplinary detention, however limited, after a constitutionally infirm hearing that is subsequently rectified by an internal administrative appeal.

The constitutional rights of prison inmates are legitimately curtailed as a result of their convictions for crim-

inal offenses. *See Hewitt v. Helms*, 459 U.S. 460, 467 (1983); *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). Especially given the difficulties inherent in prison administration, a rule that encourages careful oversight of disciplinary proceedings at the internal appellate level strikes the appropriate balance. *See Young*, 970 F.2d at 1156 ("We believe that, as a policy matter, th[e] possibility of cure through the administrative appeals process will encourage prison administrators to correct errors as an alternative to forcing inmates to seek relief in state or federal courts." (citing *Harper v. Lee*, 938 F.2d 104, 105 (8th Cir. 1991) (per curiam)). If no appellate process is made available or if its operation is inordinately delayed while a prisoner is confined as a result of a disciplinary determination, a § 1983 remedy would then be available.[1] *Cf. Wright v. Smith*, No. 93-2415, slip op. 2931, 2938-40 (2d Cir. Apr. 6, 1994) (affirming prisoner's liberty interest in not being confined for extended period without a hearing); *Lowrance v. Achtyl*, No. 93-2391, slip op. 2729, 2743 (2d Cir. Mar. 29, 1994) (due process requires opportunity to be heard within reasonable time after imposition of keeplock).

I would accordingly affirm the judgment of the district court.

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[1] It could be argued that some portion of the 77-day sentence to punitive confinement that Walker served in this case, eleven days of which occurred after the administrative reversal of the determination which imposed that sentence, resulted from inordinate delay. It seems pointless to pursue the issue in this dissent, however, in view of the majority's ruling that a § 1983 claim arises when a prisoner "commences to serve punitive sentence" imposed as the result of a constitutionally defective hearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 1390—August Term

(Argued: April 5, 1994 Decided: April 29, 1994)

Docket No. 93-2728

MICHAEL MAYS,

*Appellant,*

—v.—

JOHN MAHONEY, Hearing Officer for Disciplinary Hearing at the Sing Sing Correctional Facility,

*Appellee.*

Before:

NEWMAN, *Chief Judge,*
TIMBERS and PRATT, *Circuit Judges.*

Appeal from a summary judgment entered in the Southern District of New York, Miriam G. Cedarbaum, *District Judge*, in favor of appellee.

Reversed and remanded.

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SCOTT L. LESSING, New York, NY (Penny Shane and Deborah Gordon, on the brief), *for appellant.*

MARTIN A. HOTVET, Asst. Atty. Gen. of the State of New York, Albany, NY (G. Oliver Koppell, Atty. Gen., Andrea Green, Deputy Solicitor Gen., and Dvora Wolff Rabino, Asst. Atty. Gen., on the brief), *for appellee.*

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TIMBERS, *Circuit Judge*:

Michael Mays appeals from a summary judgment entered in the Southern District of New York, Miriam G. Cedarbaum, *District Judge*, in favor of John Mahoney, Hearing Officer for Disciplinary Hearing at the Sing Sing Correctional Facility.

Mahoney was granted summary judgment in an action commenced by Mays under 42 U.S.C. § 1983. Mays seeks reversal of that judgment, contending that the court erred in holding that an administrative appeal cured any procedural defect at the administrative hearing. He further asserts that Mahoney is not protected from liability by his qualified immunity as a prison official.

We reverse and remand.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Michael Mays was a prison inmate at Sing Sing in 1990. On July 21, 1990, he allegedly interfered with a correction officer's attempt to "lock down" the gallery by refusing to return to his cell and by yelling profanities at the officer. As a result of the incident, Mays was placed in "keeplock", which is confinement to a general population cell twenty-three hours a day, seven days a week. He lost two months of good time credits and his commissary, packages, and telephone privileges.

On July 22, 1990, a correction officer allegedly served Mays with a Misbehavior Report charging him with "Assault on Staff", "Refusing Direct Order", and "Threats". Mays asserts that he was never served with the Misbehavior Report. The State also asserts that a correction officer explained to Mays that he had a right to an assistant to help him prepare for his disciplinary hearing, a right to appear at the hearing, and a right to call witnesses in his defense. The State claims that Mays waived these rights and refused to sign the documents indicating a waiver. Instead, a prison official indicated on the forms that Mays had refused to sign. Mays asserts that he never waived these rights and that, although he had intended to exercise them, he was denied the opportunity.

Mahoney conducted the disciplinary hearing on July 26, 1990. Mays was not present. Mahoney stated for the record that Mays had waived his right to attend and that, when served with a written charge, he had waived his right to assistance and did not request any witnesses.

Relying on the Misbehavior Report, Mahoney found Mays guilty of the charges. He imposed the penalty of keeplock, loss of privileges for 45 days beginning July 21, 1990 and ending September 4, 1990, as well as the loss of two months of good time credits.

Mays subsequently appealed the disciplinary decision within the prison appellate system. He asserted that the events surrounding his disciplinary hearing violated his due process rights. Specifically, he stated that he was denied his right to receive advance written notice, to be aided by an assistant, to attend his hearing in person, to call witnesses, to present evidence, and to have the charges adjudicated by an impartial hearing officer. *See Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) (establishing due process rights in prison disciplinary proceedings).

On September 12, 1990, Superintendent John P. Keane reversed the disciplinary decision due to "procedural error" and Mays' records were expunged. As of that date, Mays already had served 45 days in keeplock and had endured 45 days without package, commissary, and telephone privileges.

Mays then commenced the instant action seeking damages pursuant to 42 U.S.C. § 1983. In September 1992, both Mays and Mahoney filed motions for summary judgment. On August 16, 1993, Magistrate Judge James C. Francis IV filed a report and recommendation. He recommended that both parties' motions for summary judgment be denied because there were genuine issues of material fact regarding whether Mays had waived his rights and whether his keeplock was administrative or punitive in nature. The report also stated that Mahoney

had not proven that he was entitled to qualified immunity because his conduct might have fallen within the exception for clearly established constitutional rights.

On October 22, 1993, the court chose not to adopt the Magistrate Judge's report. It held instead that the reversal on the administrative appeal cured any procedural defect that may have occurred. The court granted Mahoney's motion for summary judgment. This appeal followed.

Mays contends that the court erred in holding that an administrative appeal cured any procedural defect at his disciplinary hearing. He further contends that Mahoney is not protected from liability by qualified immunity as a prison official.

II.

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. P. 56(c). We review a court's grant of summary judgment *de novo*. *Frankel v. Bally, Inc.*, 987 F.2d 86, 88 (2 Cir. 1993). We may not resolve disputed issues of fact; rather, we must determine whether there are genuine issues of material fact to be resolved at trial. *Sayers v. Rochester Telephone Corp.*, 7 F.3d 1091, 1094 (2 Cir. 1993). We must remand for a full trial if there are disputed issues of material fact.

We recently held in *Walker v. Bates*, No. 93-2107, slip op. ____ (2 Cir. 1994), that reversal on administrative appeal does not preclude a damage action for a due process violation at a prisoner's disciplinary hearing where the reversal occurs after the prisoner has served at least a

portion of the restrictive confinement. Although *Walker* was a case dismissed under Rule 12(b)(6), the same principle applies in a case dismissed by summary judgment. The court in the instant case erred in granting summary judgment based upon the proposition that reversal on administrative appeal cures a due process violation.

Upon careful consideration of the facts, we hold that there are genuine issues of material fact that proscribe summary judgment—to wit, whether Mays was informed of, and waived, his *Wolff v. McDonnell* rights, and whether an objectively reasonable hearing officer in Mahoney's position would have believed that his acts did not violate Mays' right, *see Robison v. Via*, 821 F.2d 913, 920-21 (2 Cir. 1987). There can be no dispute that the keeplock was punitive in nature, at least the portion of the keeplock period imposed as punishment and served after the conclusion of the disciplinary hearing. *See Sher v. Coughlin*, 739 F.2d 77, 81 (2 Cir. 1984). Further proceedings are necessary to determine whether there was a due process violation, whether the violation was committed by Mahoney or by the officer who reported that Mays had waived his due process rights, and whether there is a basis for qualified immunity.

We hold that the court erred in granting Mahoney's motion for summary judgment.

III.

To summarize:

The court erred in granting Mahoney's motion for summary judgment since a reversal on administrative appeal does not cure the wrongful deprivation of a liberty interest resulting from a due process violation at a prisoner's disciplinary hearing.

Reversed and remanded.

**APPENDIX B—Judgment, Order, Decision of the United States District Court for the Western District of New York and Report and Recommendation of the U.S. Magistrate Judge in Walker v. Bates**

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

ROBERT WALKER

*v.*

L. BATES

Case Number: 91-CV-6167L

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the complaint is dismissed.

Date: January 6, 1993

RODNEY C. EARLY
Clerk

s/JANET E. MULLEY
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT WALKER,

*Plaintiff,*

v.

L. BATES,

*Defendant.*

DECISION AND ORDER
91-CV-6167L

Defendant's motion to dismiss was referred to Magistrate Judge Kenneth R. Fisher for a Report and Recommendation pursuant to 28 U.S.C. § 636(b). On October 9, 1992, the Magistrate Judge filed his Report and Recommendation recommending that defendant's motion to dismiss be denied. On October 19, 1992, the defendant timely filed objections to the Magistrate Judge's Report and Recommendation.

I have carefully reviewed the Magistrate Judge's Report and Recommendation as well as the objections. Based on the reasoning of my recent decision in *Sowell v. Ryan*, 88-CV-1082L, filed December 11, 1992, subsequent to the filing of the Magistrate Judge's Report and Recommendation, I must reject the Report and Recommendation of the Magistrate Judge. Based on the reasoning of the *Sowell* decision and for the reasons stated there, I hereby grant

defendant's motion to dismiss and plaintiff's complaint is hereby dismissed with prejudice.

The *Sowell* decision is attached here as Exhibit A.

IT IS SO ORDERED.

s/David G. Larimer
DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

Dated: Rochester New York
January 5, 1993.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

VICTOR SOWELL,

*Plaintiff,*

v.

D. RYAN

*Defendant.*

DECISION AND ORDER
88-CV-1082L

Victor Sowell ("Sowell"), a prisoner committed to the New York State Department of Correctional Services ("DOCS"), brings this *pro se* civil rights action under 42 U.S.C. § 1983 against D. Ryan ("Ryan"), a DOCS officer at the Attica Correctional Facility ("Attica"). Sowell alleges that Ryan violated his constitutional rights by refusing to interview two witnesses and to produce certain documentary evidence at a Tier III disciplinary hearing,[1] at which Ryan presided as the hearing officer. Sowell now moves and Ryan cross-moves for summary judgment under Rule 56(c), Fed.R.Civ.P.

[1]Under New York State regulations, misbehavior reports may be reviewed at either a Tier I, II or III hearing. Tier III hearings are generally used for more serious charges, and carry stiffer penalties. see 7 N.Y.C.R.R. §§ 251-52.2, 270.3.

For the reasons set forth below Ryan's motion for summary judgment dismissing the claims against him is granted, and Sowell's motion for summary judgment is denied.

## BACKGROUND

On July 1, 1988, Corrections Officer K. Kunold ("Kunold") filed an inmate misbehavior report against Victor Sowell, who was then an inmate at the Elmira Correctional Facility ("Elmira"). The report charged Sowell with assault, inciting a riot, and refusing to obey a direct order. Sowell was then placed in the Elmira Special Housing Unit ("SHU"), pending the results of a disciplinary hearing on the charges.

On the following day, Sowell was transferred from Elmira to Attica, where a Tier III disciplinary hearing was scheduled for July 12, 1988. Sowell was confined in the Attica SHU, and assigned an assistant—Corrections Officer R. Mackie ("Mackie")—to help him prepare for the hearing. Four days before the hearing, Sowell met with Mackie and requested that Mackie interview Kunold and Corrections Sergeant Setford ("Setford"), and obtain a copy of the unusual incident report. Mackie interviewed Setford, but he was unable to get a copy of the report or to interview Kunold. Affidavit of D. Ryan. ("Ryan Aff."), Ex. C.

On July 12, a superintendent's hearing was held before Corrections Officer Rupert Fennell ("Fennell"). Before the hearing, Sowell pleaded guilty to the charge of refusing to obey a direct order, but denied the other charges. During the hearing, Fennell received into evidence Sowell's statement, the statement from Setford, and, Kunold's written report. Fennell also determined, on the record, that it was unnecessary to interview or obtain a statement from Kunold because his written report was an adequate substitute for his testi-

mony. Based on the evidence, Fennell found Sowell guilty on the remaining two charges and sentenced him to 365 days keeplock in the SHU with loss of all privileges, starting from July 1, 1988.

Sowell immediately appealed the decision to the DOCS Commissioner, Thomas Coughlin, III ("Coughlin"), claiming that he should have been allowed to see Kunold's medical records, that it was improper for Fennell to deny him the right to question Kunold, that Fennell had not asked Setford the questions Sowell had requested, and that the hearing was not commenced within the time required. On August 25, 1988, Donald Selsky ("Selsky"), the Director of the Special Housing and Inmate Disciplinary Program, reversed Fennell's decision for "procedural error" and ordered that a rehearing be commenced within seven days of receipt of his decision.

A rehearing was commenced on September 4, 1988, and defendant Ryan was assigned to be the hearing officer. Before the hearing, Sowell made a request for witnesses and documents. Sowell requested that Setford, Kunold, and an inmate named John Giles ("Giles") be interviewed, and he contends that he requested that Kunold's medical records be produced. However, because Ryan believed that the sole purpose for the rehearing was to receive Kunold's statement into evidence, the only new testimony he allowed into evidence was a prehearing statement given by Kunold. The hearing was completed on September 10, 1988. Ryan, relying on Kunold's statement and the entire record from the first hearing, found Sowell guilty and reinstated Fennell's sentence of 365 days keeplock in the SHU.

Sowell appealed again, this time on the grounds that he should have been allowed to re-interview Setford and to question Giles, and that Ryan should have produced Kunold's medical records. Selsky again reversed the deci-

sion for "procedural error." This time, however, no rehearing was ordered by Selsky. Instead, plaintiff was released from the SHU on November 21, 1988, and his disciplinary record was expunged.

While Sowell was confined in the SHU, after the second hearing but before Selsky's second decision, he commenced this action for injunctive relief and money damages, claiming that Ryan deprived him of due process by failing to produce all of his requested witnesses and documentary evidence. By a decision dated April 10, 1989, I denied Sowell's request for a preliminary injunction and a temporary restraining order because he had already been released from the SHU. *Sowell v. Ryan,* No. 88-1082L (W.D.N.Y. April 10, 1989). Consequently, his only remaining claim is one for money damages.

Sowell now moves for summary judgment on the ground that the undisputed facts establish that Ryan deprived him of his right to due process. Ryan cross-moves on the grounds that his actions were lawful, that he is protected from liability by qualified immunity, and that based on *Zinermon v. Burch,* 494 U.S. 113 (1990) a procedural due process action does not lie under section 1983.

## DISCUSSION

### A. Summary Judgement Standard

Rule 56(c), Fed.R.Civ.P. provides that summary judgment shall be entered if the pleadings and supplemental evidentiary materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." No genuine issue of material fact exists if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. . ."

*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The burden of showing the absence of any genuine issue of material fact rests on the moving party, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), and all ambiguities and inferences that may reasonably be drawn from the facts must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). However, a non-moving party must do more than show some metaphysical doubt as to the material facts and must "come forward with 'specific facts showing that there is a *genuine issue for trial.*' " *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (quoting Rule 56(e), Fed.R.Civ.P. (alteration in original)).

B. Due Process

It is well established that a prisoner has the right to call witnesses and present documentary evidence in his defense at a prison disciplinary hearing. *Wolff v. McDonnell*, 418 U.S. 539 (1974). But that right, which protects prisoners from arbitrary action, does not encompass the full panoply of rights afforded a defendant in a criminal prosecution. *Wolff*, 418 U.S. at 555-56; *accord Fox v. Coughlin*, 893 F.2d 475, 478 (2d Cir. 1990) ("*Wolff* established a flexible standard that balanced the prisoner's interest in adequate due process against the institutional needs of the prison."). Prison officials may deny a prisoner's witness request if complying with it would be unduly hazardous to or inconsistent with "institutional safety or correctional goals," *Wolff*, 418 U.S. at 566, or if the requested testimony or documentary evidence is irrelevant or unnecessary to the proceeding. *Scott v. Kelly*, 962 F.2d 145, 147 (2d Cir. 1992) (quoting *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 30 [2d Cir. 1991]).

In this case, however, I need not decide whether, on the facts of this case, Ryan deprived plaintiff of his rights at the hearing. Pursuant to the Court of Appeals's recent decision in *Young v. Hoffman*, 970 F.2d 1154 (2d Cir. 1992), and the recent decision in *Williams v. Tavormina*, No. 89-1247T (W.D.N.Y. August 28, 1992) (Telesca, C.J.), I find that Sowell was afforded adequate due process protection regardless of whether a procedural error occurred at his second disciplinary hearing. In *Young*, the Second Circuit held that an inmate who had brought an action against a prison hearing officer for denial of due process at a disciplinary hearing, after the hearing officer's decision was reversed on administrative appeal, was afforded his due process protection because the "administrative reversal constituted part of the due process protection he received, and it cured any procedural defect that may have occurred." *Young*, 970 F.2d at 1156. *Accord Harper v. Lee*, 938 F.2d 104, 105 (8th Cir. 1991) (administrative appeal process is part of the due process protection afforded prisoners). Similarly, in *Williams*, based on facts similar to those in *Young*, Chief Judge Telesca held that the inmate plaintiff received adequate due process protection after the hearing officer's decision, which found plaintiff guilty of assaulting a fellow inmate, was reversed on administrative appeal. *Williams*, slip op. at 7-8. Thus, as in *Young* and *Williams*, because Ryan's decision was ultimately reversed on administrative appeal, Sowell received all the due process protection required by law. *Accord Harper*, 938 F.2d at 105.

There is one facet of this case that arguably distinguishes it factually from *Young*. In *Young* the inmate plaintiff never served a day of the sentence imposed at the disciplinary hearing. Sowell, on the other hand, was confined to the SHU for almost five months while two administrative appeals were pending. However, the simple fact that Sowell

was confined to the SHU during the pendency of his appeal is not dispositive, and does not command a contrary result. *See Williams*, slip op. at 8. *But see Moore v. Scully*, No. 90-3817MEL, 1992 WL 322018 (S.D.N.Y. October 28, 1992) (disagreeing with *Williams*).

First of all, Sowell had pleaded guilty to one of the charges—refusing to obey a direct order—and he could have been confined based on that admission. New York State's Codes, Rules and Regulations ("N.Y.C.R.R.") provide that where an inmate admits to the charges at a Tier III hearing, the hearing officer may impose a penalty of confinement to SHU. 7 N.Y.C.R.R. § 254.7(a)(1)(iii).[2] Therefore, after the first hearing, Sowell's status differed from other inmates in that he had pleaded guilty to violating a prison rule.

But even if Sowell had not admitted guilt on one of the charges, I believe that the decision in *Young* bars plaintiff's action for damages.

In *Young*, the Court of Appeals held that an administrative reversal "cures" any procedural defect that may have occurred at the disciplinary hearing. *Young*, 970 F.2d at 1156. I understand "cures" to mean that even if a due process violation occurred at the hearing, there is no cause of action under section 1983 on the basis of that violation, because the inmate ultimately received the due process owed him

[2]Section 254.7(a)(1)(iii) provides:

> Where an inmate *admits the charges*, or where the hearing officer affirms the charges on the basis of the evidence, the hearing officer may impose one or more of the following penalties: . . .
>
> (iii) confinement to a cell or room continuously or to a special housing unit continuously or on certain days during certain hours for a specified period; . . .
> (emphasis added).

under the law. The inmate was able to vindicate his hearing rights by means of the administrative appeal afforded to him. Whether the prisoner was confined during the appeal process is wholly irrelevant to this analysis. Therefore, Sowell has no cause of action for alleged due process violations that Ryan may have committed at the disciplinary hearing.

Confinement in SHU may constitute the alleged damage suffered by Sowell but before "damages" can be considered, there must be a finding that he suffered a due process violation. The extensive appellate procedure available to Sowell resulted in his vindication. He did not suffer from a denial of due process; rather the process afforded to him ultimately vindicated his rights and resulted in the charges being abandoned and dismissed.

The fact that it took some time to vindicate these rights while Sowell prosecuted his appeal and the fact that he remained confined during that process is unfortunate, but some delay caused by the litigation process is certainly not unique to prisoner litigation. Litigation is rarely resolved in a day.

In this case, plaintiff's appeals were handled within the time-frame established by regulation. Section 254.8 of Title 7 of the N.Y.C.R.R. provides that any "inmate shall have the right to appeal the disposition of any superintendent's hearing, to which he was a party, to the commissioner within 30 days of receipt of the disposition. The commissioner or his designee shall issue a decision within 60 days of receipt of the appeal." 7 N.Y.C.R.R. § 254.8. Both administrative reversals were rendered within 60 days of receipt of the appeal.

Furthermore, New York State has not created a liberty interest in remaining out of SHU following a determination of guilt pending completion of the administrative appeal

process. In fact, applicable regulations provide the contrary. The N.Y.C.R.R. provides that an inmate may be admitted to the SHU after "[d]isposition of Superintendent's (Tier III) Hearing for a designated period of time as specified by the hearing officer (7 N.Y.C.R.R. 254.7)," N.Y.C.R.R. § 301.2(a). *Cf.* 7 N.Y.C.R.R. § 301.3(a)(1) (inmate who is awaiting determination of a superintendent's hearing may be admitted to SHU under detention admission).

Sowell has offered no evidence to suggest that prison officials abused their discretion in confining him in the SHU during the hearing and appeal process. " 'Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' " *Hewitt v. Helms*, 459 U.S. 460, 472 (1983) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 [1979]) (alterations in original). Here, Sowell was charged with assault and inciting a riot, and he had already pleaded guilty to refusing to obey a direct order. As such, it was within the discretion of prison officials to believe that Sowell was a threat to the safety and security of the facility and to confine him in the SHU during the hearing and appeal process.[3] *See Williams*, slip op. at 8.

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[3]After the first hearing, the hearing officer imposed the penalty of 365 days keeplock in SHU "to impress upon the inmate that his behavior presents a threat to the safety and order of the facility and therefore cannot be condoned." Ryan Aff. Ex. C. After the second hearing, Ryan reinstated the penalty imposed at the first hearing to "impress upon [Sowell] that these types of actions [assault, inciting a riot, and disobeying a direct order] are very serious and will not be tolerated." *Id.*, Ex. F.

## CONCLUSION

For the reasons set forth above, plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted, and the action is dismissed.

IT IS SO ORDERED.

s/David G. Larimer
DAVID G. LARIMER
UNITED STATES DISTRICT JUDGE

Dated: Rochester, New York
December 11, 1992.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

ROBERT WALKER,

*Plaintiff,*

v.

L. BATES,

*Defendant.*

REPORT AND RECOMMENDATION
91-CV-6167L

Defendant moves to dismiss plaintiff's amended complaint pursuant to Fed. R. Civ. Proc. 12(b)(6). In his original complaint, plaintiff seeks compensation for his "unlawful confinement" in the amount of $100 per day for the 77 days he was so confined and $1.45 per each working day confined. Complaint, p.2 (docket entry #1). Plaintiff's amended complaint does little more than supply more details to support the allegations in his original complaint against Hearing Officer Bates. The amended complaint does not name defendants Robert McClellan, Superintendent and Thomas Coughlin, Commissioner, which complies with Judge David G. Larimer's order of May 8, 1991, which dismissed plaintiff's complaint against these defendants.

This matter was referred to me by Judge David G. Larimer by order dated July 23, 1992, pursuant to 28 U.S.C. §§ 626(b)(1)(A) and (B).

## BACKGROUND

In his amended complaint filed July 31, 1992 (docket entry #11), plaintiff seeks relief, pursuant to 42 U.S.C. §§ 1983, for the 77 days he was confined to the Special Housing Unit. After a disciplinary hearing, held December 10, 1990, which was conducted by Tier III Hearing Officer L. Bates, plaintiff was sentenced to 120 days in SHU. The determination was based an incident that occurred on December 5, 1990, when Correction Officer P. Youmans, during a "routine cell frisk," found a 9½ inch metal rod and extra bedding in plaintiff's cell. Inmate Misbehavior Report (attached as Exh. A to defendants's Motion to Dismiss). Plaintiff was moved into SHU on December 10, 1990 and confined there until February 22, 1991.

Plaintiff asserts that his constitutional rights were violated because he was not allowed to call witnesses at the hearing. The witnesses plaintiff would have called, had the hearing officer allowed him to do so, are Correction Officer P. Youmans, Gallery Officer Quarnek and Correctional Sergeant Zarneki. *See* Plaintiff's Answer to Defendant's Interrogatories, p.1 (docket entry #15).

Plaintiff filed an administrative appeal of the disciplinary determination. By notice dated February 11, 1991, the determination was reversed "as of February 8, 1991," without explanation or other documentation setting forth the basis for the reversal. The "facility chose not to conduct a rehearing" and the records were "expunged from plaintiffs institutional files." Amended Complaint, p.2. Plaintiff was not released from SHU, however, until February 22, 1991.

## DISCUSSION

Defendant moves to dismiss on the basis of *Young v. Hoffman*, slip opn., at 6071 (2d Cir. July 31, 1991) and *Williams v. Tavormina*, No. 89-CV-1247T (W.D.N.Y. August 28, 1992). In *Young v. Hoffman*, the Second Circuit held that an administrative reversal of a Tier III prison disciplinary hearing "constitute[s] part of the due process protection" an inmate receives, and thus serves to "cure[] any procedural defect that may have occurred" at the Tier III hearing. *Id.* slip opn. at 6076. The administrative reversal in *Young* was specifically based on the hearing officer's failure to call the witnesses requested by plaintiff at the disciplinary hearing. The reversal recognized that the plaintiff's procedural due process rights had been violated, and the reversal was held to have cured the defect. Importantly, the plaintiff in *Young* never served any part of a disciplinary sentence. Thus, the plaintiff did not suffer a penalty as a result of the procedurally defective hearing and its subsequent reversal. In its decision in *Young v. Hoffman*, the Second Circuit adopted the holding in *Harper v. Lee*, 938 F.2d 104 (8th Cir. 1991). In that case, the Eighth Circuit held that the plaintiff was afforded due process protections when prison officials ordered a rehearing after the plaintiff appealed the result of a disciplinary hearing. Upon rehearing, the "disciplinary committee found the plaintiff guilty and reimposed the original disciplinary sanctions." *Harper v. Lee*, 938 F.2d at 105. At the rehearing, the plaintiff was allowed to submit a log book into evidence, which right had been denied him at the first hearing. The rehearing thus cured the procedural defect present in the first hearing. Similar to the plaintiff in *Young*, the plaintiff in *Harper* did not suffer an additional penalty as a result of the procedurally defective original hearing, by virtue of the subse-

quent rehearing, which served to cure the due process violation.

Defendant has also attached a recent decision by Chief Judge Michael A. Telesca in which he was recently confronted with a situation similar to the plaintiff's. *See* Decision and Order, dated August 28, 1992, *Williams v. Tavormina*, No. 89-CV-1247T, (attached as Exh. A to Motion to Dismiss). The plaintiff in *Williams* was found guilty of violations at a Tier III disciplinary hearing. Plaintiff appealed the determination on the ground that he had not been allowed to call witnesses. On appeal, the disciplinary determination was reversed on the grounds that the charge was unsubstantiated by the evidence presented and no testimony had been presented by the reporting sergeant, who the plaintiff wanted to call at the hearing. The plaintiff nonetheless ended up serving a two month cell confinement before the reversal was effective. Decision and Order, p.5. Relying on *Young v. Hoffman*, Chief Judge Telesca found that the plaintiff's Fourteen Amendments rights had not been violated because the "administrative appeals process" afforded "important due process protection." *Id.* p.7. As to the two month cell confinement, Chief Judge Telesca found that "the fact that Williams suffered an interim penalty should not dictate a contrary result" because "[a]bsent a showing of abuse of discretion, courts must defer to the judgment of prison officials in balancing prisoners' rights against penological interests." *Id.* p.8 (citations omitted). This part of Chief Judge Telescal's decision was based on his finding that the plaintiff had in fact committed the violation of which he was found guilty at the disciplinary hearing, i.e., an altercation with another inmate. *Id.* p.8.

Plaintiff's situation is distinguishable from all these cases. In *Young v. Hoffman*, the disciplinary determination was reversed specifically because the plaintiff's due process

rights had been violated. As pointed out above, the plaintiff in *Young* never served any part of the disciplinary sentence and thus did not suffer a penalty as a result of the defective hearing. *Young v. Hoffman*, slip opn. at 6074. In this case, the reasons for the reversal of the disciplinary determination were not given, but plaintiff was confined to SHU for 77 days. Consequently, despite the reversal, plaintiff has suffered a penalty.

In *Harper v. Lee*, the decision followed by the Second Circuit in *Young v. Hoffman*, the plaintiff was found guilty of the charges upon rehearing. *Harper v. Lee*, 938 F.2d at 105. Again, although the plaintiff's disciplinary determination was "reversed," the reversal did not address the status of the original penalty imposed on plaintiff at hearing—120 days in SHU. Although prison officials chose to expunge plaintiff's record, instead of holding a rehearing, the papers submitted to the court fail to indicate how the plaintiff's original penalty was resolved by the reversal, if at all. Amended Complaint, p.2.

The disciplinary determination against the plaintiff in *Williams v. Tavormina* was reversed because of procedural due process violations. Decision and Order, p. 5. Again, even though the plaintiff in *Williams* had served approximately two months cell confinement, there were enough facts presented to find that plaintiff was indeed guilty of the infraction originally charged. *Id.* p.8.

In the instant case, other than a copy of the "Inmate Misbehavior Report," neither party has provided any documentation indicating what the hearing officer's decision was based on, nor is there any showing of why the disciplinary determination was reversed. In addition, defendant has presented no facts which would support a 2½ month deprivation of plaintiff's liberty interest, such as proof that he was, in fact, guilty of original misconduct charge. *See*

*Russell v. Coughlin*, 910 F.2d 75, 77 (2d Cir. 1990) (prisoner has liberty interest in remaining free from administrative confinement).

To sumarize, the Second Circuit's decision in *Young v. Hoffman* cannot be applied to plaintiff's situation because there is nothing to indicate that the determination was reversed on the basis that plaintiff's constitutional right to due process was violated. Furthermore, with respect to plaintiff's 77 day confinement in SHU, Chief Judge Telesca's decision in *Williams* does not apply because it is unclear here whether the plaintiff in fact committed the misconduct charged, a finding that could be made in *Williams*. Plaintiff contends that, had he been allowed to call witnesses, the result of the hearing might have been different, and he might not have been confined. Response to Defendant's Motion to Dismiss, pp.2-3 (docket entry #18). For example, plaintiff alleges that he had just been moved into the cell in which the contraband was found, which cell had been "previously occupied by another inmate." *Id.* p.2. Moreover, defendant has not provided an explanation why plaintiff was not released from SHU until February 22, 1991, especially in view of the fact that the notice reversing the Hearing Officer's determination was dated February 11, 1991, and purportedly reversed the determination "as of February 8, 1991."

When contemplating dismissal of a complaint on the basis of Fed. R. Civ. Proc. 12(b)(6), "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of a claim that would entitle him to relief." *Young v. Calhoun*, 656 F.Supp. 970, 972 (S.D.N.Y. 1987). In construing a *pro se* plaintiff's complaint, the court "is obliged to construe their pleadings and papers liberally." *LaBounty v. Adler*, 933 F.2d 121, 122 (2d Cir. 1991) (citing *Haines v.*

*Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 652 [1972]). It cannot be said " 'with assurance that petitioner can prove no set of facts in support of his claim entitling him to relief.' " *Hewitt v. Helms*, 459 U.S. 468, 469, 103 S.Ct. 864, 870 n. 5 (1983) (quoting *Hughes v. Rowe*, 449 U.S. 5, 12-13, 101 S.Ct. 173, 177 [1980]).

## CONCLUSION

Based on the foregoing reasons, it is my Report and Recommendation that defendant's motion to dismiss be denied.

The parties should be on notice that, pursuant to 28 U.S.C. §§ 636(b)(1)(C) and Local Rule 30(a)(3), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt thereof. Failure to file objections within the specified time waives the right to appeal a District Court Order adopting this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a) and 6(e); *Thomas v. Arn*, 474 U.S. 140 (1985); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir. 1992); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 30(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with**

**the provisions of Rule 30(a)(3), or with the similar provisions of Rule 30(a)(2) (concerning objections to a Magistrate Judge's Decision and Order), may result in the District Court's refusal to consider the objection.**

s/Kenneth R. Fisher
KENNETH R. FISHER
UNITED STATES MAGISTRATE
JUDGE

Dated: Rochester, New York
October 9, 1992

**APPENDIX C—Judgment, Memorandum Opinion and Order of the United States District Court for the Southern District of New York and Report and Recommendation of the U.S. Magistrate Judge in Mays v. Mahoney**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MICHAEL MAYS,

*Plaintiff,*

*against*

JOHN MAHONEY, Hearing Officer for Disciplinary Hearing at the Sing Sing Correctional Facility,

*Defendant.*

90 CIVIL 6380(MGC)
JUDGMENT

Both parties having moved for summary judgment, and the said motions having come before the Honorable MIRIAM GOLDMAN CEDARBAUM, U.S.D.J., thereafter the matter having been referred to Magistrate Judge James C. Francis, IV, for a report and recommendation, and the Court thereafter on October 22, 1993, having handed down its

memorandum opinion and order (#72293); denying plaintiff's motion, and granting defendant's motion, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiff's motion for summary judgment be and it is hereby denied, and it is further,

ORDERED, that defendant's motion for summary judgment be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed for the reasons stated in the Court's Memorandum Opinion and Order, dated October 22, 1993.

DATED: NEW YORK, NEW YORK
October 28, 1993

JAMES M. PARK
Clerk

By: (Illegible)
Deputy Clerk

Filed Oct 28, 1993
U.S. District Court
S.D. of N.Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MICHAEL MAYS,

*Plaintiff,*

*against*

JOHN MAHONEY, Hearing Officer for Disciplinary Hearing at the Sing Sing Correctional Facility,

*Defendant.*

MEMORANDUM OPINION
AND ORDER
90 Civ. 6380 (MGC)

Appearances:

Michael Mays, Plaintiff *Pro Se*, Southport Correctional Facility, P.O. Box 2000, Pine City, New York 14871-5442

Robert Abrams, Attorney General of the State of New York, Attorney for Defendant, 120 Broadway, New York, New York 10271

By: Judith Zerden

CEDARBAUM, J.

Michael Mays, a state prisoner, sues under 42 U.S.C. §1983 for alleged deprivation of his due process rights by the hearing officer at a disciplinary hearing at Sing Sing Correctional Facility in 1990. Both sides move for summary judgment. Magistrate Judge Francis submitted a Report and Recommendation in which he concluded that both motions should be denied. Defendant has filed an objection to the Report and Recommendation and argues that the prison's administrative appeals process cured any possible due process violation.

This lawsuit stems from an incident at Sing Sing on July 21, 1990. Plaintiff was charged with assault on staff, refusing a direct order, and threats, following a disturbance during a correction officer's attempt to "lock down" the gallery. As a result of these charges, plaintiff was placed in "keeplock." Five days later, on July 26, 1990, defendant conducted a Tier III hearing to consider the charges. At the hearing, defendant found plaintiff guilty of all three charges and imposed as penalty 45 days keeplock, and 45 days loss of packages, commissary and telephone privileges, retroactive to July 21.

Following the hearing plaintiff filed an administrative appeal. On September 12, after plaintiff's punishment had ended, Superintendent Keane reversed the defendant's decision because of "procedural error." Shortly thereafter, all records of the charges were expunged from plaintiff's file. Plaintiff then began this action.

This case is governed by the Second Circuit decisions in *Young v. Hoffman*, 970 F.2d 1154 (2d Cir. 1992) and *Russell v. Scully*, ____ F.3d ____, No. 92-2057, slip op. 3717 (2d

Cir. 1993). Under those precedents, plaintiff was not deprived of due process because the administrative reversal constituted part of the due process he received, and cured any procedural defect that may have occurred. *Young*, 970 F.2d at 1156. The policy reason for this rule was explained in *Young:* "as a policy matter, [the] possibility of cure through the administrative appeals process will encourage prison administrators to correct errors as an alternative to forcing inmates to seek relief in state or federal court." 970 F.2d at 1156.

In *Russell*, the plaintiff served approximately five months of a 180 day sentence of confinement in the Special Housing Unit before his punishment was reversed, *Slip op.* at 3720, whereas Mays completed his punishment before it was reversed. That difference, however, does not warrant a different result in this action.

Accordingly, the plaintiff's motion is denied and the defendant's motion is granted.

SO ORDERED.

Dated: New York, New York
October 22, 1993

s/Miriam Goldman Cedarbaum
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MICHAEL MAYS,

*Plaintiff,*

*against*

JOHN MAHONEY, Hearing Officer for Disciplinary Hearing at the Sing Sing Correctional Facility,

*Defendant.*

90 Civ. 6380 (MGC)

REPORT AND RECOMMENDATION

TO THE HONORABLE MIRIAM G. CEDARBAUM, U.S.D.J.:

The plaintiff, Michael Mays, brings this action pursuant to 42 U.S.C. § 1983. Mr. Mays, a prison inmate, alleges that the defendant, Correction Officer John Mahoney, violated his due process rights in the course of a disciplinary hearing at Sing Sing Correctional Facility. The parties have each moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and for the reasons that follow, I recommend that both motions be denied.

Background

The incident that resulted in the plaintiff's disciplinary hearing took place on July 21, 1990. (Defendant's Notice of Cross-Motion ["Defendant's Motion"], Exh. 1) . Mr. Mays allegedly interfered with a correction officer's attempt to "lock down" the gallery by refusing to return to his cell and by yelling profanities at the officer. (Defendant's Motion, Exh. 1). As a result of this incident, Mr. Mays was placed in "keeplock." (Defendant's Motion, Exh. 1).

On July 22, 1990 at 2:35, a correction officer allegedly served Mr. Mays with a Misbehavior Report charging him with "Assault on Staff," "Refusing Direct Order," and "Threats." (Defendant's Motion, Exh. 3) . Mr. Mays avers he was never served with the Misbehavior Report. (Affidavit of Michael Mays dated September 3, 1992, at 2).

At this time, the correction officer allegedly explained to Mr. Mays that he had a right to an assistant to help him prepare for his disciplinary hearing. (Defendant's Motion, Exh. 2). He was given an Assistance List identifying available officers. (Defendant's Motion, Exh. 2). This Assistance List indicates that Mr. Mays waived his right to an assistant. (Defendant's Motion, Exh. 2). However, the document does not contain Mr. Mays' signature but only the indication that he "refused to sign." (Defendant's Motion, Exh. 2). The plaintiff alleges he was not in fact permitted to select an assistant. (Mays Aff. at 2).

A Hearing Record Sheet indicates that Mr. Mays did not request any witnesses. (Defendant's Motion, Exh. 3). Like the Assistance List, it does not contain Mr. Mays' signature but rather states that he "refused to sign." (Defendant's Motion, Exh. 3). The plaintiff alleges that he was not permitted to call witnesses at his hearing. (Mays Aff. at 2).

Another form, simply entitled "Memorandum," but referred to by the defendant as a "refusal form," indicates that Mr. Mays waived his right to attend his disciplinary proceeding, known as a "Tier III" hearing, scheduled for July 26, 1990. (Defendant's Motion, Exh. 4). Again, this form is not signed by Mr. Mays and instead states that he "refused to sign." (Defendant's Motion, Exh. 4). The plaintiff implies that he did not intend to waive attendance, but rather would have wanted to appear in person at his hearing. (Mays Aff. at 1; Complaint, Attached Sheets at 2).

The disciplinary hearing was conducted by Correction Officer Mahoney on July 26, 1990. (Defendant's Motion, Exh. 5 at 1). Mr. Mays was not present at this hearing. (Defendant's Motion, Exh. 5 at 1). During the hearing Officer Mahoney referred to the "refusal form" which indicated that Mr. Mays had waived his right to attend. (Defendant's Motion, Exh. 5 at 1). Officer Mahoney further noted that the record indicated that Mr. Mays was served with a written charge, waived his right to assistance, and did not request any witnesses. (Defendant's Motion, Exh. 5 at 1).

Relying on the Misbehavior Report, Officer Mahoney found Mr. Mays guilty of the charges and imposed as the penalty keeplock and loss of packages, commissary, and telephone privileges for 45 days beginning July 21, 1990 and ending September 4, 1990, as well as loss of good time for two months. (Defendant's Motion, Exh. 5 at 2, Exh. 6; Mays Motion, Exh. A).

Mr. Mays appealed the Tier III decision. (Defendant's Motion, Exh. 7; Mays Aff. at 2). In his appeal, the plaintiff alleged that the events surrounding his disciplinary hearing violated his due process rights. (Complaint, Attached sheets at 1). Specifically, he stated that he was denied his right to receive advance written notice, to be aided by an assistant, to attend his hearing in person, to call witnesses, to present

evidence, and to have the charges adjudicated by an impartial hearing officer. (Complaint, Attached Sheets at 2-4).

On September 12, 1990, the disciplinary decision was reversed due to "procedural error." (Defendant's Motion, Exh. 7; Mays Motion, Exh. B) . Mr. Mays' records were expunged. (Defendants' Motion, Exh. 8). As of that date, Mr. Mays had already served his 45 days in keeplock and had endured 45 days without package, commissary, and telephone privileges.

Mr. Mays then filed the instant action seeking damages, and he has now filed a motion for summary judgment. The defendant has filed a cross-motion for summary judgment. The defendant alleges that even if the plaintiff's hearing was held without providing him with notice or an opportunity to be heard, call witnesses, or introduce evidence, Mr. Mays was not denied due process because all errors were cured by the reversal on appeal. (Defendant's Memorandum of Law in Support of Defendant's Cross-Motion for Summary Judgment ("Defendant's Memorandum" at 2). The defendant also alleges that Officer Mahoney is protected from liability by the doctrine of qualified immunity because his conduct was reasonable and did not violate any well-established constitutional or statutory rights. (Defendant's Memorandum at 2).

Discussion

A. The Standard for Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, "a motion for summary judgment should be granted only 'when, viewing the record in the light most favorable to the nonmoving party, the evidence offered demonstrates that there is no genuine issue of fact and that the moving

party is entitled to judgment as a matter of law.' " *Pension Benefit Guaranty Corp. v. LTV Corp.*, 875 F.2d 1008, 1015 (2d Cir. 1989) (quoting *Cinema North Corp. v. Plaza at Latham Associates*, 867 F.2d 135, 138 [2d Cir. 1989]), *rev'd on other grounds*, 496 U.S. 633 (1990). However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Furthermore,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Thus, disagreement about nonmaterial facts or controversy over the legal significance of undisputed facts will not impede summary judgment. In making its determination, a court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. *Meiri v. Dacon*, 759 F.2d 989, 997 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985).

B. Due Process

An inmate facing a disciplinary hearing which may result in solitary confinement or loss of good time has a due process right to receive written notice "to inform him of the charges and to enable him to marshal the facts and prepare a defense." *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974). After the receipt of written notice, the inmate must be given at least 24 hours to prepare for the disciplinary hearing. *Id.*

During the hearing, the inmate has a right to call witnesses and present documentary evidence in his defense "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id.* at 566. The inmate also has a right to assistance in preparing for a disciplinary hearing. *Eng v. Coughlin*, 858 F.2d 889, 897 (2d Cir. 1988); *Green v. Bauvi*, 792 F. Supp. 928, 938 (S.D.N.Y. 1992). In addition, the inmate is entitled to appear in person at his hearing. *Freeman v. Rideout*, 808 F.2d 949, 953 (2d Cir. 1986) (citing *Wolff*, 418 U.S. at 564-66, *cert. denied*, 485 U.S. 982 (1988). Finally, any hearing officer must be fair and impartial. *McCann v. Coughlin*, 698 F.2d 112, 122 (2d Cir. 1983).

As a result of a guilty disposition at the disciplinary hearing, an inmate may be subjected to keeplock, *see McKinnon v. Patterson*, 568 F.2d 930, 936 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978), which consists of confining the inmate to his own cell and depriving him of almost all contact with the rest of the prison population and participation in the normal routine of the prison. *Id.* Keeplock imposed for fourteen days or longer is a sufficiently serious deprivation to accord an inmate due process protection. *Id.* at 937-38.

In the case at hand, Mr. Mays alleges that he was not given advance written notice of his Tier III disciplinary hearing (Mays Aff. at 2), was not assigned an assistant to help him prepare his defense (Mays Aff. at 2), was not allowed to attend his disciplinary hearing (Mays Aff. at 1; Complaint, Attached Sheets at 2), was not allowed to call any witnesses or present any evidence at his hearing (Mays Aff. at 2; Complaint, Attached Sheets at 3), and was denied an impartial hearing officer. (Complaint, Attached Sheets at 4). These allegations, if true, would establish a violation of the plaintiff's due process rights.

However, according to the Second Circuit, a due process violation at a disciplinary hearing does not necessarily create a valid cause of action. *See Young v. Hoffman*, 970 F.2d 1154, 1156 (2d Cir. 1992). In *Young*, the court held that an administrative reversal is part of the due process protection that an inmate receives and cures any prior procedural defect that may have existed.

In *Young*, the inmate had not actually served his disciplinary sanction before the guilty finding was reversed. *Id.* at 1155. Nevertheless, in *Russell v. Scully*, No. 92-2057, 1993 WL 188677 (2d Cir. June 4, 1993), the Second Circuit held that administrative reversal cured due process violations even though the inmate had served time in a Special Housing Unit ("SHU") from the date of his disciplinary hearing until a reversal on appeal. *Russell*, 1993 WL 188677, at *1-*3. The Court stated that since the appeal is part of the due process procedure, the time that an inmate is administratively confined pending determination of the appeal is not the basis for § 1983 liability. *Id.* at *2.

However, in a recent case in this court, *Moye v. Selsky*, No. 90 Civ. 2503, 1993 U.S. Dist. LEXIS 9063, at *2-*3

(S.D.N.Y. July 2, 1993),[1] Judge Ward emphasized the distinction between administrative and punitive confinement and made the following observation:

> In connection with their discussion on this point, defendants note that the *Russell* court found that administrative confinement pending appeal is not a deprivation of liberty. *See Russell v. Scully*, 1993 WL 188677, at *2. Defendants claim that Moye's 323 days in the SHU were administrative, not punitive, confinement and therefore assert that Moye suffered no deprivation of liberty under § 1983. [citation omitted.]
>
> Plaintiff argues that the confinement was punitive, inasmuch as there is no administrative justification for Moye's loss of other privileges such as access to the telephone, commissary or packages. In addition, plaintiff points to the fact that there was no periodic review of plaintiff's segregation, as is required in the case of administrative confinement.
>
> For the reasons stated by plaintiff, the Court finds that Moye's confinement was punitive.

*Id.* at *40, n.13.

Thus, it is critical in the instant case whether the time Mr. Mays served in keeplock after his disciplinary hearing but

[1] In *Moye*, the plaintiff served 323 days in the SHU as a result of a guilty disposition from a disciplinary hearing that was affirmed on appeal. *Moye*, 1993 U.S. Dist. LEXIS 9063 at *2-3. That determination was eventually vacated by the New York State Supreme Court in an Article 78 proceeding, Moye was released from SHU, and he subsequently commenced a § 1983 action. *Id.* Judge Ward found that *Russell* did not govern *Moye* because it was the Article 78 proceeding, and not an administrative reversal, that corrected Mr. Moye's original deprivation. *Id.* at *39-40.

before the reversal on appeal was administrative or punitive confinement. If Mr. Mays was subjected to administrative confinement, then the reversal on appeal cures any procedural due process violations he allegedly suffered. However, if the time he served was punitive, then the reversal on appeal would not cure any procedural defects, and the defendant would remain potentially liable for the deprivation.

The parties have not addressed whether Mr. Mays confinement was administrative or punitive. His sentence consisted of 45 days in keeplock, 45 days of loss of packages, commissary, and telephone privileges, and loss of two months of good time. (Defendant's Motion, Exh. 5 at 2, Exh. 6; Mays' Motion, Exh. A) . The loss of privileges and loss of good time might result in the confinement being characterized as punitive rather than administrative. This unresolved factual issue precludes either party from being granted summary judgment.

C. Qualified Immunity

Government officials who perform discretionary functions are protected from liability for civil damages where their conduct does not violate "clearly established [federal] statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). The test to determine whether a right was clearly established at the time an incident in question occurred is:

> (1) whether the right in question was defined with "reasonable specificity"; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful.

*Benitez v. Wolff*, 985 F.2d 662, 666 (2d Cir. 1993) (quoting *Jermosen v. Smith*, 945 F.2d 547, 550 (2d Cir. 1991), *cert, denied*, ____ U.S. ____, 112 S. Ct. 1565 [1992]).

Applying this test, Officer Mahoney has not established that he is entitled to qualified immunity. Each of the six due process rights purportedly violated had been defined with "reasonable specificity" by the Supreme Court or the Second Circuit at the time of Mr. Mays' disciplinary hearing: the right to advance written notice, *Wolff*, 418 U.S. at 563-64; the right to assistance, *Eng*, 858 F.2d at 897-98; the right to attend the hearing in person, *Freeman*, 808 F.2d at 953 (citing *Wolff*, 418 U.S. at 564-66); the right to call witnesses, *Wolff*, 418 U.S. at 566; the right to present evidence, *Id.*; and the right to an impartial hearing officer, *McCann*, 698 F.2d at 122. Thus, the first two requirements are met.

In analyzing the last prong, the Court must determine whether a reasonable correction officer would have understood that his or her acts were unlawful under this preexisting law. Qualified immunity will not apply where the correction officer *"knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury . . . ."

*Harlow*, 457 U.S. at 815 (citation omitted) (emphasis in original).

In *Dawes v. Selsky*, No. 91-CV-0576E(M), 1993 WL 124696 (W.D.N.Y. April 16, 1993), the plaintiff alleged in a § 1983 action that he had not waived his right to attend his disciplinary hearing. *Id.* at *2. The defendants produced a form which stated that Mr. Dawes waived his right to attend his hearing. *Id.* However, the form did not contain Dawes' signature but rather the notation that he refused to sign. *Id.* The court stated that the existence of the document "raises an issue of fact as to whether the plaintiff waived his right to be present," and therefore denied the motion for summary judgment. *Id.*

In the instant case, the defendant relies on similar forms indicating that Mr. Mays waived his right to assistance, to call witnesses, and to attend his hearing. (Defendants' Motion, Exhs. 2-4). As in *Dawes*, these forms do not contain Mr. Mays' signature but rather the notation that he refused to sign. Accordingly, there is a genuine issue of fact regarding whether he waived his rights, and summary judgment should therefore be denied to both parties.

Conclusion

For the foregoing reasons, both plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment should be denied. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Miriam G. Cedarbaum, Room 604, and to the chambers of the undersigned, Room 633. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

s/James C. Francis IV
JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE
JUDGE

Dated: New York, New York
August 16, 1993

Copies mailed this date to:

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